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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 196.

JOSEPH J. DARLINGTON AND GEORGE W. GRAY, EXECUTORS OF PHILIP A. TRACY, DECEASED, APPELLANTS,

vs.

ERLE H. TURNER, WILMER TURNER, ASHBY TURNER, AND LUNETTE TURNER, BY WILMER TURNER, NEXT FRIEND, APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

NATH'L WILSON,
CLARENCE R. WILSON,
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STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming, with a certain modification, a decree of the supreme court of the District of Columbia entered in this cause, which was begun by the filing in that court, sitting in equity, of a bill of complaint by Erle H. Turner, Wilmer Turner, and Ashby Turner and Lunette Turner, by Wilmer Turner, their next friend, against Joseph

J. Darlington and George W. Gray, executors of Philip A. Tracy, deceased.

The defendants in that suit are the appellants here.

The material averments of the bill of complaint and the specific grounds for the relief prayed for therein are substantially:

That for many years prior to 1888 Philip A. Tracy, then residing in Washington, D. C., had been the confidential agent and trustee of Silas H. Turner, of Fauquier county, Virginia, and at the time of the death of Silas H. Turner, which occurred in Virginia on the 21st of September, 1888, had in his, Tracy's, hand a *trust fund*, consisting of money and securities, particularly described in the bill of complaint, which had belonged to Silas H. Turner, amounting to about thirty thousand dollars.

That Silas H. Turner, by his will, which was duly admitted to probate, bequeathed all his property to the complainants, the children of his brother, Thomas M. Turner, of Minden, Louisiana, and appointed Tracy to distribute the proceeds of the property so bequeathed equally between them.

That Tracy never distributed the property or the proceeds of the property so bequeathed or any part thereof to or among the claimants, except that to one of the complainants, Erle H. Turner, small sums aggregating fourteen hundred dollars were paid, nor did he ever render any account thereof to the complainants, but kept the entire trust fund, principal, interest, and profits, in his own possession, until the day of his death, which occurred in the city of Washington in July, 1898, and that after his death *the entire trust fund, principal, interest, and profits, came into the possession of the defendants, the appellants herein, the executors of Tracy.*

The complainants prayed for discovery and an accounting; that Tracy be adjudged to have been, from the time of the death of said Silas H. Turner to the time of the death of Tracy, the *trustee* for the complainants for the whole estate of said Turner, and particularly for the property described in the bill of complaint; and that as such trustee he be held accountable for said trust fund during his life; and that the executors of Tracy, the said defendants, be held accountable for the same since his death; and also that *the defendants be decreed to pay over to the complainants the "whole amount of said trust estate to which they may be found entitled on a proper accounting, together with all interest due thereon, and all profits realized therefrom"* (Rec., pp. 1 to 9).

The answer of the defendants, the executors of Tracy, denies that their testator, Tracy, retained in his possesion down to the day of his death, and that after his death there came into the possession of his executors, the funds and securities which are alleged to have constituted the trust fund described in the bill of complaint; and it avers that said funds and securities were paid over, transferred, and delivered on the 30th of November, 1888, by said Tracy to Thomas M. Turner, the father of the complainants, and that the proceeds thereof were collected by said Turner, and were used by him in the support and maintenance of the complainants.

It further avers that there came into the possession of the defendants, as executors of Tracy, the paper writing set out in the answer purporting to be signed by Thomas M. Turner, "natural tutor and agent for my minor children," and purporting to be a receipt "in full under the will of S. H. Turner, deceased."

This paper is set out in the answer and is headed,

"Full list of notes and cash in the hands of Philip A. Tracy, belonging to S. H. Turner, deceased, Nov. 30, '88."

The answer also denies that the defendants, as executors of Tracy, hold or have in their possession any property charged with any trust on behalf or in favor of the complainants, and it denies the right of the complainants to the relief prayed for or to any relief by reason of their gross and unreasonable delay and laches (Rec., pp. 11 to 19).

A replication having been filed and proofs taken, a decree was entered adjudging that Tracy was trustee for the complainants in respect of all the property and estate of Silas H. Turner being or coming into the hands of Tracy at and after the death of said Silas, and that the complainants are entitled to an accounting from the defendants as executors of Tracy concerning the money and properties received by Tracy from said Silas H. Turner, and referring the cause to the auditor to state the account (Rec., p. 25).

The auditor reported March 9, 1904, that the estate of Tracy was chargeable with a primary liability of $30,051.93, with interest from November 30, 1888, and that the complainants were each entitled to their respective interests therein, being one-fourth part to each, less certain charges made against them respectively for the reasons stated in the report (Rec., p. 368).

Exceptions were filed to the auditor's report by the defendants, the appellants herein, and on the 9th of June, 1904, a decree was entered overruling the exceptions, confirming the auditor's report, and adjudging that there is due from the defendants' testator, Tracy, to the several complainants the following sums:

To Erle H. Turner, with interest on $7,512.75 from February 1, 1904, until paid.....	$12,006.11
To Wilmer Turner, with interest on $7,512.72 from February 1, 1904, until paid.....	13,226.11
To Ashby Turner, with interest on $7,512.72 from February 1, 1904, until paid.....	11,963.36
To Lunette Turner, with interest on $7,512.72 from February 1, 1904, until paid.....	11,445.86
Total, exclusive of the additional interest.	$48,641.44

Rec., p. 394.

The total assets in the hands of the executors of Tracy being only $47,000 and some city lots of unknown value, as appeared from the stipulation of counsel filed in the cause, the decree further adjudged "that from the said assets the defendants shall, after paying the costs in this cause to be taxed by the clerk and after deducting any further costs, allowances and credits in administration, pay over and distribute ratably to the complainants or their solicitor of record on account of the amounts hereinbefore adjudged to be due them with interest on the parts thereof as hereinbefore adjudged so far as said assets shall extend; and that complainants be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendants, and as may be necessary to satisfy the amounts severally adjudged to be due the complainants as aforesaid. And that the complainants have execution as at law" (Rec., p. 395).

This decree determined that the payment and transfer by Tracy to Thomas M. Turner, the father of the complainants, was unauthorized and wrongful, and that the amount thereof and the value of the entire estate of Silas H. Turner, less

some small deductions, is recoverable, with interest, out of the assets of the estate of Tracy.

On appeal, the Court of Appeals affirmed this decree, with costs, with a single modification, charging the interest of Erle H. Turner with $1,200 (Rec., p. 425).

The decree so entered by the Court of Appeals is the subject of this appeal.

CHRONOLOGICAL STATEMENT OF FACTS.

The record shows conclusively not only that the allegation made in the bill of complaint that the entire trust fund, "principal, interest, and profits," was in the possession of Tracy at the time of his death, and came into the possession of the executors of Tracy after his death, is incorrect, but also that the complainants, the appellees herein, well knew, at the time their verified bill of complaint was filed, that the entire "trust fund," so called, or nearly the entire fund, according to their present claim, was paid over and delivered by Tracy to their father, Thomas H. Turner, in November, 1888.

The contention made by the complainants in the court below and the relief granted by the court below rest upon grounds quite independent of and apart from the averments on which issue was joined.

Without any change or amendment of the pleadings, a new issue and ground for relief was introduced, which is that the conduct of Tracy in paying over the trust fund to the father of the complainants, and in inducing Thomas M. Turner to consent to allow Tracy to convert to his own use certain moneys, was wrongful and fraudulent, and entitled the complainants, the appellees, to recover of the defendants,

the appellants, the executors of Tracy, out of the assets of the estate, the amount of the alleged trust fund, or a sum equal to the vanished fund, with interest thereon at the rate of six per cent. per annum and profits.

The questions of fact and of law thus sought to be raised cover a wide field of inquiry, and a great number of somewhat complicated circumstances, and make necessary a chronological statement of the facts disclosed by the record.

In 1871 Silas H. Turner, a resident of Virginia, came to this city and placed in the hands of his friend, Philip A. Tracy, a resident of Washington, and at that time a clerk in the Post Office Department, the sum of $12,000, and asked Tracy to aid him in the investment of that sum in real-estate notes. Tracy agreed to do this, and attended to the collection of the notes as they came due, Turner retaining the notes in his possession. After a while, Turner, in order to facilitate the management of his business, sent the notes to Tracy, who thereafter collected the proceeds and reinvested them, sending Turner a statement from time to time, and occasionally sending money (Rec., p. 15).

This course of dealing continued from 1871 to the time of the death of Silas Turner in 1888, at which time the $12,000 had increased to over $25,000 through Tracy's management and attention, for which no compensation had been paid to him.

On April 30, 1888, Silas Turner made a will (prepared by Tracy), bequeathing all his property to the four children of his brother, Thomas M. Turner, of Minden, La., and appointing Philip A. Tracy to distribute the proceeds equally between them (Rec., p. 265).

In August, 1888, Thomas M. Turner, hearing that his

brother Silas was sick, came to Marshall, Va., where Silas was then staying with his niece, Mary Rust, and remained with him until his death, in September, 1888.

He immediately took possession of his brother's effects, which consisted of a watch, forty or fifty dollars, a suit of clothes, a trunk containing a few articles of clothing, and a list of notes, and the will, both of which papers Silas Turner, before his death, had shown to Thomas. Nothing was found showing ownership of any other property whatsoever, nor were there any accounts, papers or letters relating to the transactions between Silas Turner and Tracy, except the list of notes and the will (Rec., p. 136).

The day after the burial of his brother, Thomas Turner read the will aloud, in the presence of several witnesses, in the house of Mary Rust, and its contents became generally known to the relatives (Rec., pp. 301-313).

Within a few days thereafter Thomas Turner came to Washington with his attorney, Mr. Eppa Hunton, bringing with him the list of notes found in his brother's trunk, which constituted the only evidence of the possession by Tracy of any money or securities that had belonged to Silas Turner. He visited Tracy at his office, accompanied by Mr. Hunton, and showed Tracy the list of notes, who said, according to Turner, that "he had all the notes" in his possession, and that the notes were "as good as gold" (Rec., p. 108).

This so-called list or paper which is relied upon by the complainants, the appellees herein, to fix and determine the precise amount of money for which Tracy was primarily liable to the estate of Silas Turner, appears in the record as "Erle H. Turner Exhibit No. 22," and is in the words and figures following:

"S. H. Turner.

Nov. 18, '82.	(W. Z. Partello) *Paid*	0,000.00
	(Erased in copy.)	
Nov. 1, '79.	Susan W. McNamee	1,700
Jan'y 19, '81.	Edwin F. Jones	1,000
April 7, '75.	J. H. Hollidge	800
Mar. 22, '84.	John B. Taylor	1,000
" " " " "		1,000
July 12, '81.	Flora V. Andrews (2)	1,000
June 6, '85.	Jennie J. West	3,400
April 3, '85.	Caroline Isdell (2)	1,335.20
Dec. 15, "	Eliz. V. Lee	600
" " " " "		600
Jan'y 8, '86.	Mary J. Lewis (3)	1,200
Dec. 30, '85.	John L. Carusi	1,350
May 19, '86.	Julius Rehwold (4)	2,200
Dec. 24, '85.	Rufus A. Morrison	1,500
Oct. 30, '86.	John B. Avery (4)	800
" 2, "	Thomas R. Benton (15)	1,800
June 1, "	G. H. La Fetra	1,036.90
April 18, '87.	L. A. Grant	300
Aug. 20, '85.	D. B. Groff	1,500
	(Footing in lead pencil)	24,122.10

"Second Sheet.

1888.	Am't for'd (in lead pencil)	24,122.10
Feb. 18.	C. W. Baldwin	2,500
Jan'y 27.	A. H. Nixon (3)	1,350
Mar. 12.	D. B. Groff	1,000
	(Footing in lead pencil)	28,972.10

"This list was given by Mr. Tracy as a list of the property of S. H. Turner, in his hands" (Rec., p. 211).

The body of the paper, written in ink, is in the handwriting of Tracy. The footings of the columns of figures and the words "Am't for'd," in pencil, were written by Thomas Turner. The words "This list was given by Mr. Tracy as a list of the property of S. H. Turner, in his hands," were written by Erle H. Turner (Rec., p. 107).

This exhibit consists of two pieces of paper pinned together and is in an altered and mutilated condition.

In respect of the notes therein described, which Thomas Turner testifies that Tracy told him were then all in his possession, five of them, amounting to $2,535.50, had been before the death of Silas Turner paid and canceled (Rec., p. 358).

After his conversation with Tracy, Thomas Turner returned to Virginia, as Tracy was about to go out of town for a short time.

Silas Turner's will was admitted to probate by the Fauquier county court on the 28th of November, 1888 (Rec., p. 267).

On that day or the following day Thomas Turner came to Washington, in response to a letter received from Tracy, and had an interview with Tracy at the National Hotel in the evening, at which time Tracy handed to him a paper which he asked Thomas Turner to examine and see if it would be a satisfactory settlement (Rec., p. 111).

The paper referred to is Exhibit T. M. T. No. 1, and is in the words and figures following:

"S. H. T.

John B. Taylor	(2)	2,000.
Julius Rehwold	(4)	2,200.
Louisa A. Grant		300.
Diller B. Groff		1,500.
" "		1,000.
Mrs. E. V. Lee	(2)	1,200.
Roth & Moore		325.
Edwin F. Jones		1,000.
Charles W. Baldwin		2,500.
Alban H. Nixon	(3)	1,350.
Flora V. Andrews	(2)	1,000.
John B. Avery	(3)	600.
Thos. H. Benton	(17)	2,040.
Frank W. Paige		3,000.
J. L. Burns	(3)	1,387.50
E. V. Jarvis		200.
C. A. McEwen	(2)	1,200.
Md. Ave. lots		1,800.
Cash T. M. T.		439.25
" "		33.
" "		304.64
(In'st due)		600.
Estate		$25,979.39

Nov. 30, '88. Endorsed: T. M. Turner. (Copy.) List of notes left at L. Johnson & Co. bank, Nov. 30, '88" (Rec., p. 220).

Thomas Turner testifies that he examined the paper that night and was dissatisfied with it, and at an interview the next morning with Tracy, at the same hotel, made objection to it, because some notes had been substituted that were not in the original list, and he did not know whether they were good, and because there was a difference of over $6,000

in the amount specified in that statement and the amount specified in the list or paper first shown to Tracy and admitted by him to be correct.

On the same day, however, Thomas Turner agreed to the settlement said to have been proposed and insisted upon by Tracy, and the notes and money were transferred and delivered by Tracy to him, and his receipt taken therefor, as is shown by the paper writing set out in the answer, and which is Exhibit T. M. T. No. 2 and is in the words and figures following:

"Full List of Notes and Cash in the Hands of Philip A. Tracy, Belonging to S. H. Turner, Deceased, Nov. 30, '88.

Date of notes.			
Mar. 22, '84.	Two notes of	John B. Taylor for $1,000 each	2,000.00
May 19, '86.	Two "	" Julius Rehwold for $300 each	600.
" " "	Two "	" Julius Rehwold for $800 each	1,600.
April 18, '87.	One "	" Louisa A. Grant	300.
Mar. 12, '86.	One "	" Diller B. Groff	1,500.
" " "	One "	" " "	1,000.
Dec. 15, '85.	Two "	" Eliza V. Lee, $600 each	1,200.
June 13, '88.	One "	" Roth & Moore	325.
Jan'y 19, '81.	One "	" Edwin F. Jones	1,000.
Feb. 18, '88.	One "	" Charles W. Baldwin	2,500.
Jan'y 27, '88.	Three "	" Alban H. Nixon, $450 each	1,350.
July 12, '81.	Two "	" Flora V. Andrews, $500 each	1,000.
Oct. 30, '86.	Three "	" John B. Avery, $200 each	600.
" 22, "	Seventeen notes of	Thos. H. Benton, $120 each	2,040.
Aug. 25, '88.	One note of	Frank W. Paige	3,000.
Oct. 17, "	Three "	" John L. Burns, $462.50 each	1,387.50
Nov. 6, "	One "	" E. V. Jarvis	200.
Nov. 19, "	Two "	" C. S. McEwen ($600 each)	1,200
	" lots on	Md. Ave. N. E.	1,800.
Sep. 28,	Cash T. M. T.		439.25
Nov. 30, "	" in full		337.64
(In lead pencil)	(In'st now due)	(in lead pencil)	600.
	522		
	25,379.39 (in lead pencil)		

Nov. 30, '88. Received the above-described notes and cash in full under the will of S. H. Turner, deceased.

T. M. TURNER,
Natural Tutor and Agent for My Minor Children.

(In pencil:) Notes all placed in Second National bank by T. M. Turner.

(In pencil:)
25,979.39
840.

26,819.19

Endorsement: (In pencil) List for receipt No. 2. T. M. Turner's receipt for notes belonging to S. H. Turner, dec'd. Keep this."

Rec., p. 221.

It is to be observed that the total of the notes and moneys thus receipted for, $25,979.39, is *less* than the total of the notes described in the list first shown to Tracy by only $457.51, if there be deducted from the footing of that list $2,555, the amount of the five notes that had been paid before Silas Turner's death, and which could not have been in Tracy's possession in November, 1888.

In explanation of his action in agreeing to this settlement, Thomas Turner testified that Tracy told him at that time:

"That he would not qualify as executor of the will, and he said that if I attempted to qualify as guardian or administrator, he was satisfied the heirs of my brother here in Virginia would contest the will. He furthermore told me that there would be a good deal of cost attached to it, that I would have to give a bond, it seems to me, of double the amount of

the whole estate, and that would be difficult for me to do, he said, and he also said there would be a tax on it, a legacy or inheritance tax, I understood it—I did not know the law here—which would amount to several thousand dollars; and he wound up by stating that, all that taken into consideration, this amount would be more, perhaps, than I would get clear if I were to administer on it. He then remarked that if I would settle by this list, he would turn the property over to me without having anybody appointed as executor or administrator or guardian, and that we could put the notes in bank here and have them collected, and I could get the means away from here as quick as possible, and perhaps that would prevent the other heirs of my brother in Virginia from attempting to break the will" (Rec., pp. 111, 112).

Inasmuch as it is now the contention of the appellees not only that the payment and transfer of the notes and money described in the receipt was illegal and wrongful, but also that it was fraudulently contrived and brought about by Tracy in order that he might retain for his own use some of the moneys of the estate in his possession and rid himself of any liability therefor, and inasmuch as this contention is based, mainly if not entirely, upon the testimony of Thomas Turner himself, before referring to the disposition made by him of the notes and money transferred to him, notice should be taken of certain other important facts and statements made by Thomas Turner.

These facts and statements show that Turner himself, before seeing Tracy, had determined to obtain possession of his brother's estate in order to carry out the wishes of his brother expressed to him before his death. With that purpose in view, he informed Tracy of the alleged danger that a contest would be made by the relatives, and also of the

obstacles in the way of the regular administration of the estate. It appears also that Turner's effort to put upon Tracy the responsibility for the payments made to him, and to make Tracy the instigator of that plan comes from an afterthought, and from a desire to aid his children in their present suit against Tracy's executors, to obtain the equivalent of the money that was paid to him nearly twenty years ago.

At the time of the death of Silas Turner, Thomas resided in Louisiana and was deputy clerk of the district court of Webster parish (Rec., p. 103).

He, of course, well knew the meaning of the words "natural tutor and agent for my minor children," which he put after his signature.

He lived at Minden with his wife and four children, the appellees, Erle, born in 1868; Wilmer, born in 1875; Ashby, born in 1880, and Lunette, born in 1882 (Rec., p. 105).

When he got to his sick brother in Virginia, his brother, speaking of his will, told him of the notes in Tracy's hands and of his will, and that he had left his estate to his, Thomas's, children, and wanted him, Thomas, to manage it, and directed him to buy a home for his niece, at whose house he died, that would cost not over $1,500, and also directed him to pay some notes given by another niece, Agnes Kerfoot, that amounted to about $500 (Rec., pp. 141-2-3).

These statements he repeats several times in his testimony. He testified also that his brother said to him that he did not want any of his relatives to have any of his money except the two nieces, Mrs. Rust and Mrs. Kerfoot; that an effort might be made to break the will, and if that happened he, Thomas Turner, "must use every means in the world to defeat it,

that he did not want them to have it, that he would rather give it to some stranger than for them to have it" (Rec., p. 157).

When asked, on cross-examination, what authority he had in respect of the estate of his brother, his reply is:

"Oh, I had no authority, only in this way; I was trying to keep them from attacking the will. I was trying to keep them in a friendly way until I could get the matter in shape so that I could control it. I had promised my brother that I would protect it. He had directed me to do that. He said he did not want them to have it; and I was in a peculiar attitude.

* * * * * * *

"None of them ever threatened to me that they would, but I dreaded it, and feared it, and tried to keep them in a friendly attitude with me for that reason" (Rec., p. 180).

While in this peculiar attitude of fear of his relatives and of desire to keep his promise to his brother, his anxiety to accomplish what he had in mind being no doubt real, he had his interview with Tracy, in regard to the settlement, and a settlement was made which was in exact accord with what he, Thomas Turner, wished to accomplish, in respect, at least, to the bulk of the estate, and also with the wishes of his brother as expressed to him on his death bed.

Tracy's explanation of this settlement and of his relations with Silas Turner was given in a paper addressed to the executors of his will, found by his executors among his effects, and is set out in the answer in response to one of the prayers of the bill (Rec., p. 15).

The statements therein made in respect of the dissatisfaction with the will of the relatives in Virginia, and as to the danger of a contest were, no doubt, communicated by

Thomas Turner to Tracy, and there is nothing therein to show or that tends to show that the transfer of the "package of notes" was not made in perfect good faith on the part of Tracy, as well as on the part of Thomas Turner, and in the belief that the interests of the children of Thomas Turner would be best protected and subserved and the directions of Silas Turner complied with by putting his estate in the control of Thomas Turner.

THE DISPOSITION MADE BY THOMAS TURNER OF HIS BROTHER'S ESTATE DELIVERED TO HIM BY TRACY.

All the notes except two, and $150 of the money received from Tracy, November 30, 1888, Thomas Turner deposited the next day in the Second National Bank of Washington to his own credit. The notes were all paid and their proceeds checked out by him from time to time. On the 21st of February, 1891, he drew, on his own check, $4,800. On the 10th of April, 1891, he gave his son, Erle Turner, a check for $1,200. By his last check, drawn May 19 of the same year, for $40, he overdrew his account $27.34 (Rec., pp. 244-245).

He gives the following as some of the principal items of his expenditures. He paid the funeral expenses and the medical and other bills of his brother, the cost of probating the will, etc., amounting to about $640. He paid $1,350 for a home for Mrs. Rust and gave her $150 in money, and to his niece, Mrs. Kerfoot, $500, as he testifies his brother directed him to do. To other relations he gave about $600. He paid his wife $2,480 in respect of money due her from him (Rec., p. 127). He paid out for himself and wife and three youngest children and his sister and niece, in traveling expenses

from Louisiana to Virginia and Texas and back and forth, about $1,250 (Rec., pp. 127-128).

In August, 1889, he removed from Louisiana to Texas with his family, and in Vernon, Texas, he bought a lot, built and furnished a house in which his family resided for many years. About the same time he bought a wheat farm or ranch containing 640 acres, for which he paid $2,500, and which he improved and stocked and provided with machinery. He paid for the support of his wife and youngest children while they were in Virginia about $1,500. He paid for the family expenses for eight months in Louisiana and four months in Texas, $1,000 (Rec., pp. 127-128).

He kept no exact account of the moneys he paid out, but he explains with some particularity the checks which he drew on the Second National Bank (Rec., pp. 131, 140-151). After making a statement which he says is about as far as he can account for the money, he testifies that the balance he lost in farming in Texas (Rec., p. 128).

After Thomas Turner resigned his position as deputy clerk, up to the time he was examined as a witness in this case, in May, 1901, he had no employment or property of any kind from which he derived any income, nor were there any resources for the support of himself and family other than the money and the proceeds of the notes obtained by him from Tracy. Until Erle left home in 1891, and Wilmer left home in 1894 or 1896, the entire family of six persons was maintained wholly and exclusively from the estate of Silas Turner that came into the possession of Thomas Turner by the alleged wrongful act of Tracy (Rec., pp. 133-134).

The house in Vernon, where the family lived, was well furnished and comfortable, a double house containing seven

rooms (Rec., p. 190). The children lived, dressed, and were educated like others in the same position. It is in evidence that their father did everything that he could do for their comfort and education (Rec., p. 187). The house and lot in Vernon were conveyed by Thomas Turner in payment of a debt secured by a deed of trust, and thus lost in 1895 (Rec., p. 128).

In respect of the farm, in September, 1894, Thomas Turner and his wife joined in a deed, which was duly recorded, of the property to his three children, Wilmer, Ashby, and Lunette, "in consideration of the sum of $5,400 to me in hand paid by Philip A. Tracy, executor of the last will and testament of my deceased brother, S. H. Turner, in trust for the use and benefit of my children" (Rec., p. 239).

On the same day Thomas Turner executed a bill of sale to the same children of the personal property on the farm, which was duly recorded, in consideration of the sum of $3,000, alleged to have been paid by the grantees (Rec., p. 241). The personal property was consumed by use.

The title to the farm which had been conveyed to the three children in 1894, as has been stated, was made to revert to the State of Texas in 1896 by the failure of Thomas Turner to pay to the State, as required by the law relating to school lands, the annual interest on the purchase price of $2 per acre. The annual interest was about $60.

After the forfeiture to the State the land was reclassified and was offered for sale at $1 per acre, and was bought by Thomas Turner, who continued in possession as owner until a month or two before he was examined as a witness. He then sold it for $5,000, less $100. Of the purchase money he had still in bank to his own credit, when his testimony was

being taken, $1,615 (Rec., pp. 130, 140). This money Thomas Turner claims as his own, and asserts that his children have no right or interest in it (Rec., p. 143).

THE RECEIPT BY ERLE TURNER FROM HIS FATHER AND FROM TRACY OF MONEY FROM SILAS TURNER'S ESTATE.

In the summer of 1890 Thomas Turner went with his family back to Virginia from Vernon, leaving his son Erle, then of age, in charge of his farm, and remained in Virginia until April, 1891, at which time Erle, who had become tired of farming, met his father in Washington. While in Texas, and before coming North, Erle had received from his father checks on the Second National Bank of Washington, amounting to over $4,300, the proceeds of which, it is alleged, were used in Texas in improvements, etc., on the farm (Rec., pp. 56-68, 122).

Thomas Turner and his son Erle then had a settlement in Washington in respect of Erle's services and expenditures in Texas and an alleged indebtedness to Erle from his father.

It was agreed between them that there was due Erle $1,750, and in payment thereof his father gave him a check on the Second National Bank for $1,200, and two of the identical notes which his father had received from Tracy, and which appear in the list of notes deposited in the bank (Rec., pp. 68, 243). Of the total amount of the money and securities received by his father from Tracy and deposited in bank, there was paid into the hands of Erle over $5,000 in money and $525 of the notes. With the check and the notes Erle opened an account with the same bank in his own name (Rec., p. 68).

When in Washington on this occasion, in April, 1891,

Erle was introduced by his father to Tracy at the National Hotel, where Tracy was living (Rec., p. 74).

After the alleged settlement was made with his father, Erle went to Philadelphia, where he remained with some absences, to the time of Tracy's death, in July, 1898. During that time he had a number of interviews with Tracy, and received from him at various times between September 6, 1893, and November 30, 1897, sums of money in the aggregate over $1,100, and gave receipts therefor, in each of which it was stated that the payments were of the estate or on the estate of S. H. Turner, deceased (Rec., pp. 212-213). There was also considerable correspondence between them during that time, and also correspondence between Tracy and Thomas Turner, and Mrs. Turner, and Wilmer. The record contains thirteen letters from Tracy to Erle (Rec., pp. 202-206), and six (found among Tracy's effects) from Erle to Tracy (Rec., pp. 213-219).

In order to understand these letters it is necessary to bear in mind that in the receipt given by Thomas Turner the words and figures "Lots on Md. Ave. N. E.—$1,800" do not relate to money paid by Tracy to Thomas Turner, but to money which had been invested by Tracy in lots on Maryland avenue, and for which Tracy remained accountable after the receipt was given (Rec., p. 221).

At the time of the settlement in April, 1888, Tracy gave Thomas Turner a written statement that he had invested $3,600 in ground on Maryland avenue N. E., and that Silas H. Turner was entitled to one-half thereof of the proceeds after deducting the cost of grading, subdividing, examining title, etc. (Rec., pp. 113-222).

The auditor found from the testimony taken before him

that Tracy realized and received, in February, 1890, from the real estate transaction and the investment of the $1,800, $3,069.65, and charges him with that amount (Rec., p. 375).

In lieu of cash for this sum, Tracy took notes secured on real estate for $3,000, and the balance in cash (Rec., p. 352). After receiving the notes and money Tracy, in writing to Thomas Turner in May 1892, said: "The interest on the $2,600, in my hands has not yet been paid though I expect it soon. It is invested in good paper and is drawing 8% per cent." (Rec., p. 229).

The letters from Erle to Tracy and from Tracy to Erle show conclusively that the references therein to notes and money in Tracy's hands related exclusively to the notes received in respect of the Maryland Avenue property and their proceeds, and to no other notes or fund; that he well knew that the money paid to him by Tracy came out of those proceeds, and well knew that Tracy had paid the remainder of his uncle's estate to his father, and what his father had received.

In a letter not dated, but written apparently in February, 1898, by Erle to Tracy to induce Tracy to say that he, Tracy, had no money in his hands belonging to Erle, in order to protect him against a woman creditor with whom he had some trouble, occurs the following passage:

"About the property. I wish you would just let it rest as it is for the present. Now about letting the others have it. I think they have all had more than I have and are getting the use of it now.

"When papa made an assignment he put all the property in Wilmer, Lunette, and Ashby's name. Did not mention me not even for the $1,300 that I had loaned him. I have his order for this am't in your hands. This is all I will ever

get, as I would not make any fuss about the Vernon property, so you see I much prefer you keep the property just as it is. You are safe in what I receipt you for, and I think it no more than right that I should have this as they have all the rest and are having the benefit of it now—at any rate do not take any step for the present."

Rec., pp. 213-214.

The assignment referred to is that hereinbefore mentioned, which was made by Thomas Turner to his three children, and in which the consideration expressed therein was referred to as money paid to him by Tracy, as executor of the will of his brother Silas for his children (Rec., p. 239).

On the 4th of April Erle wrote again to Tracy in part as follows:

"I am sorry you seem to doubt my word in regard to this matter. I feel that she has gotten a great deal more out of me than I have ever owed her and I shall make the matter very plain to you when I see you. I did not mean that you should tell what was not just true. *A friend of mine told me that as you had paid me more than ¼ of the balance left in your hands this should clear you, as the balance would go to the other children*, so I just made the suggestion" (Rec., p. 219).

When asked in cross-examination to explain the meaning of these letters and the very significant statements in them, he replies that he didn't know just what he did mean, and could not explain, and did not remember (Rec., p. 82).

After paying or advancing to Erle $1,435, the last payment having been made not long before Tracy's death, there remained in Tracy's hands about $1,700 of the amount which he received in respect of the Maryland Avenue transaction.

It does not appear that Tracy made any disposition of that balance in money payments, but on the 27th of April, 1898, he executed to Erle a deed for an undivided half of his, Tracy's, interest in square 649 and transmitted it to Erle (Rec., p. 207). The value of the interest transferred to Erle was $900 (Rec., p. 307).

The letter in which the deed was sent to Erle was destroyed by him (Rec., p. 50). The deed was given in evidence. It was never recorded, and it is claimed that it was never accepted.

Mr. Tracy died at the Providence Hospital, in Washington, on the fifth day of July, 1898, leaving a last will and testament which was duly admitted to probate the day after his death (Rec., pp. 21, 359), and which is as follows:

"I, Philip A. Tracy, of Washington, in the District of Columbia, knowing well the certainty of death and the uncertainty of the time thereof, do make and declare this and no other to be my last will and testament; that is to say:—

"Item first: I direct that my executors, hereinafter named, shall collect all debts justly owing to my estate and pay all debts that I may justly owe, including my funeral expenses.

"Item second: I direct that my executors shall sell for the highest price obtainable in cash, at public or private sale, as they may deem best, all my property both real and personal, and wheresoever situated, except that named in item eleventh of this will.

"Item third: My executors shall purchase and cause to be erected in lot numbered one hundred and ninety-eight (198) in 'Oak Hill' cemetery, in the District of Columbia, a family monument of Barre gray granite, of modern design, not less than twelve feet in height, whereon shall appear, in raised letters and figures, my family name, and the names of my father, mother, brother, sister and myself, and the date

of the birth and death of each, as stated in a memorandum attached to this will. This monument to be erected and paid for as soon as practicable after my death, and before any of the following legacies are paid.

"Item fourth: I give and bequeath to the Oak Hill Cemetery Company in the District of Columbia, one thousand ($1,000.) dollars in cash to be invested by the company, and the revenue and income derived from such investment to be used for the purpose of keeping lot No. 198 in the said cemetery in good order and condition, and for cleaning and repairing the monument whenever necessary.

"Item fifth: My executors shall pay to the National Bank of the Republic, in this city, the balance, if any, due on the note of my sister Adelaide Tracy, deceased, after deducting the proceeds of the sale of the Metropolitan Railroad stock held by the bank as collateral.

"Item seventh: I give and bequeath to Norman P. Lake, of Rectortown, Virginia, one hundred ($100.) dollars in cash, and my gold watch and chain.

"Item eighth: I give and bequeath to Daniel H. Greene of Rectortown, Virginia, one hundred ($100.) dollars in cash.

"Item ninth: I give and bequeath to the Home for Incurables in the District of Columbia, one hundred ($100.) dollars in cash, for the use of the home.

"Item tenth: I give and bequeath to the trustees of Trinity Episcopal church, northeast corner of Third and C streets, N. W., in this city, two thousand (2,000) dollars in cash to help pay for the erection of a building for the use of the Sunday school.

"Item eleventh: I give and bequeath to the 'Little Sisters of the Poor,' on H street, N. E., in this city, all my wearing apparel, trunks and books.

"Item twelfth: The total sum of money remaining in the hands of my executors, I give and bequeath to the trustees of the Epiphany Church Home in this city, to help pay for the enlargement of the building now used as the home, or

for the erection of another building for the same use and purpose.

"I nominate, constitute and appoint George W. Gray and Joseph J. Darlington, of this city, the executors of this my last will and testament, having confidence in their honesty and believing that they will faithfully carry out my wishes and intentions.

"In witness whereof I have hereunto set my hand this twenty-second * * * day of March, in the year of our Lord, one thousand eight hundred and ninety-four.

"PHILIP A. TRACY."

Rec., pp. 21-22.

This will having been admitted to probate and letters testamentary having been issued, the executors, the appellants, took possession of all the property of the testator and made and returned to the court an inventory of the property (Rec., p. 359).

Erle Turner, having written to Tracy for money on the 14th of September, 1898, and his letter coming to Mr. Darlington, Mr. Darlington immediately wrote to him, informing him that Mr. Tracy had died in July, and that he had left a will appointing the appellants executors (Rec., p. 367). Erle Turner came at once to Washington, and called on Mr. Darlington, and saw the will, and employed counsel (Rec., p. 50).

On the 21st of September, 1898, counsel notified the executors that their clients claimed that Tracy held in trust for them under the will of their uncle, Silas Turner, the sum of about $30,000; that they made claim for that amount, and notified them to make no payments of any character from Tracy's estate until their claim was settled (Rec., p. 269).

At the time the executors received notice of the claim of

the appellees, all other debts and legacies had been paid in full by the executors, including all the legacies bequeathed except the following: $1,000 to the Oak Hill Cemetery, $2,000 to the trustees of the Trinity Episcopal Church, and the residuary bequest to the trustees of Epiphany Church Home.

The notice having been received before the monument provided for in the will had been erected or contracted for, no stone marks Tracy's grave (Rec., p. 393).

The execution of the decree now appealed from would consume the entire assets of the estate, and nothing would be left for the beneficiaries above named. The bequests that were paid amounted to about $500 (Rec., p. 21).

After the lapse of several months questions were carefully prepared by the aid of counsel and sent to the *father* and *mother* of the complainants, then in Vernon, and in February, 1899, their answers were received (Rec., pp. 233, 262-264). These question elicited information from the father and mother of the complainants which the father and mother had been in possession of for more than ten years.

It is claimed by the appellees that the knowledge thus obtained was the first that Erle or Wilmer Turner had as to the terms and contents of their uncle's will, or as to the amount and character of the estate left by their uncle.

On the 10th of June, 1899, the appellees filed their bill of complaint and the proceedings were had that have been stated, resulting in the present appeal.

Upon these facts and circumstances, and the law applicable thereto, we wish to set forth the following points or propositions, as grounds for the reversal of the decree of the court below:

1. The bill of complaint having alleged that a trust fund came into the hands of the executors of Philip A. Tracy, and that they were accountable to the complainants, appellees herein, and the proof having shown that said trust fund never came into the possession of the executors of Tracy, but that Tracy had paid over that fund to Thomas M. Turner, father of the complainants, there was a fatal variance between the pleadings and proof, and the bill should have been dismissed.

2. Tracy was never trustee for Silas H. Turner as to the funds in Tracy's hands belonging to Turner, at or before Turner's death, nor after his death did he become trustee as to the said funds for the complainants, appellees herein, the children of Thomas M. Turner, beneficiaries under the will of Silas Turner.

3. The payment of November 30, 1888, by Tracy to Thomas Turner, as "natural tutor and agent for his minor children," was made in good faith by Tracy and at the solicitation and by reason of the representations of Turner, and was a complete and valid discharge, *pro tanto*, to Tracy against subsequent demands made on him by the complainants, appellees herein.

4. The appellee, Erle Turner, is barred from the relief prayed by his acquiescence in the alleged breach of trust—the payment by Tracy of the funds in his hands to Thomas Turner—and by his laches in prosecuting his claim.

5. The appellee, Wilmer Turner, is barred from the relief prayed by her acquiescence in the alleged breach of trust—the payment by Tracy of the funds in his hands to Thomas Turner—and by her laches in prosecuting her claim.

6. Tracy did not have in his possession as trustee on the 30th day of November, 1888, or at any other time, the sum of money designated in the decree appealed from as chargeable against him and against his estate, nor is his estate chargeable with interest thereon.

These propositions are found in the following assignment of errors, though differently expressed:

ASSIGNMENT OF ERRORS.

1. The court below erred in not reversing the decree of the supreme court of the District of Columbia of October 10, 1902, with directions that the bill of complaint be dismissed because of the variance between the pleadings and the proof.

2. The court below erred in affirming said decree and in holding and deciding that defendants' testator, Philip A. Tracy, was trustee for the complainants in respect of all the property and estate of Silas H. Turner being or coming into the hands of said Tracy at and after the death of the said Silas H. Turner.

3. The court below erred in not reversing the said decree with directions that the bill of complaint be dismissed on the ground that said court, as a court of equity, was without jurisdiction to grant the relief prayed for in the bill of complaint, there being to the complainants a full, adequate, and complete remedy at law.

4. The court below erred in affirming said decree and in holding and deciding that the complainants were entitled to an accounting from the defendants as executors of said

Philip A. Tracy of and concerning the moneys and properties received by said Tracy from said Silas H. Turner.

5. The court below erred in affirming said decree and in holding and deciding that the payment and delivery by Philip A. Tracy to Thomas Turner, father of the complainants, of the notes and moneys described in Exhibit T. M. T. No. 2 (Rec., p. 221) was not a valid discharge and acquittance to said Tracy, *pro tanto*, as to any claim or demand made on him thereafter by the complainants.

6. The court below erred in not reversing said decree, with directions that the bill of complaint be dismissed as to the complainants Erle H. Turner and Wilmer Turner, on the ground that said complainants were barred from the prosecution of their claim against the estate of Philip A. Tracy by their acquiescence in Tracy's payment and delivery of the notes and moneys in his possession to Thomas M. Turner, and by their laches in the assertion of their supposed rights against said Tracy.

7. The court below erred in affirming the decree of the supreme court of the District of Columbia of June 8, 1904, for that it, the said decree, overruled the defendants' exceptions to the auditor's report.

8. The court below erred in affirming the said decree for that it, the said decree, ratified and confirmed the auditor's report.

9. The court below erred in affirming the said decree and in holding and deciding that there are due from defendants'

testator to the several complainants the various sums set out in said decree.

10. The court below erred in affirming said decree and in holding and deciding that the finding of the auditor (excepted to by defendants), that the estate of Philip A. Tracy was primarily liable to the complainants in the sum of $30,051.03, was correct.

11. The court below erred in affirming said decree and in holding and deciding that the finding of the auditor (excepted to by defendants) that the liability of the estate of Philip A. Tracy to the complainants is to be determined by the list of notes, Exhibit E. H. T. No. 22 (Rec., p. 211), and not by the receipt given by Thomas Turner to Philip A. Tracy, being Exhibit T. M. T. No. 2 (Rec., p. 271), was correct.

12. The court below erred in affirming said decree and in holding and deciding that the refusal of the auditor (excepted to by defendants) to find that the estate of Philip A. Tracy, if liable in any sum to the complainants, is liable only in the sum of $25,979.39, according to said receipt given by Thomas Turner to Philip A. Tracy, the same being Exhibit T. M. T. No. 2, was correct.

13. The court below erred in affirming the said decree and in holding and deciding that the finding of the auditor (excepted to by defendants) that the estate of Philip A. Tracy is to be charged with the sum of $28,972.10 less $1,800 invested in real estate, and with $439.25, interest collected, and with $3,069.65 realized from said real estate investments, was correct.

14. The court below erred in affirming the said decree and in holding and deciding that the finding of the auditor (excepted to by defendants) that Tracy's estate is chargeable with interest from the 30th of November, 1888, to the date of his accounting, on the amount for which the auditor found said estate to be primarily liable, was correct.

15. The court below erred in affirming the said decree and in holding and deciding that the estate of Philip A. Tracy is chargeable with interest on the moneys and notes paid and delivered by Philip A. Tracy to Thomas M. Turner on the 30th day of November, 1888.

ARGUMENT.

I.

The bill of complaint should have been dismissed because of the fatal variance between the pleadings and the proof.

The bill of complaint is framed upon the theory that Philip A. Tracy was trustee for Silas H. Turner as to the fund of $28,972.10 which Turner placed in his hands, and that after Turner's death he became trustee for the complainants, legatees under the will of Silas Turner, retaining this entire fund in his own possession, and that this entire fund, principal, interest, and profits, continued in Tracy's possession down to the time of his death, and has now come into the hands of his executors, the defendants, appellants herein.

The primary object of the bill was to impress the fund in the hands of the appellants with the trusts in favor of the

complainants, appellees herein, on the ground that the trust fund had been followed and specifically traced into the hands of these defendants, the executors of Philip A. Tracy.

Thus it is alleged in paragraph six of the bill of complaint that the complainants "are informed and believe that at the time of the writing and execution of said will (of Silas Turner) and continuously thereafter, and at the time of the death of said Silas H. Turner and continuously thereafter up to the death of Philip A. Tracy, the said Tracy was and continued to be in the possession of the entire estate of said Silas H. Turner, which consisted at or about the time of the death of said Turner of promissory notes of various persons, secured by deeds of trust upon real estate in this District and of the interest in money accruing due and payable thereon and amounting in the aggregate to about thirty thousand dollars" (Rec., p. 3).

Again, in the tenth paragraph of the bill of complaint it is alleged that Tracy never accounted to the complainants for these funds, "but that on the contrary the said Tracy retained in his possession, down to his death, with the exception of the fourteen hundred dollars aforesaid, the entire trust fund, principal, interest and profits, *and the same have come into the possession of the defendants, his executors*" (Rec., p. 5).

In the eleventh paragraph of the bill of complaint it is alleged that Tracy never denied the rights of the complainants to said fund or his trusteeship with reference thereto (Rec., p. 5).

See also the third, sixth and seventh prayers for relief (Rec., p. 9).

The defendants in their answer deny that the alleged

trust fund continued in Tracy's possession and has come into their own possession. See answer of the defendants, paragraphs six, seven, and ten (Rec., pp. 12 and 13).

The proofs show conclusively, and appellees do not now deny, that the great bulk of the so-called trust fund did not continue in the possession of Tracy up to the time of his death, and did not come into the possession of the appellants, but was paid over by Tracy to the father of the appellees ten years before Tracy's death. (See Rec., pp. 221-222.)

This *fact* was thoroughly known and understood by the appellees and their counsel before the filing of the bill of complaint. Thomas Turner, in a letter to his daughter, Wilmer Turner, under date of February 17, 1899, explained the payment of more than $24,000 to him by Tracy (Exhibit T. M. T. No. 17, Rec., p. 233). The bill of complaint was filed June 10, 1899.

The distinct issue raised by the bill and answer and replication is: Did this fund continue in Tracy's possession up to the time of his death and come into the hands of the defendants as executors?

On the other hand, the distinct issue raised by the testimony, and in the argument on the final hearing, in respect of the bulk of the trust fund is: Was the payment, made by Tracy to Turner as natural tutor and guardian of his minor children, a valid discharge *pro tanto* to Tracy?

The issue thus raised as to the lawfulness of the payments made by Tracy, and the collateral issues of fact concerning the compliance or non-compliance by Thomas Turner with the laws of Louisiana, were inconsistent with and repugnant to the issue distinctly presented by the averments of the bill.

In this situation the well-known rule which prevails in equity, no less than at law, that a complainant can recover only upon the case and the theory of the case stated in his bill, must be applied. The complainants in this case cannot be allowed to introduce new issues of fact in the testimony or arguments, nor can they recover on a theory different from that set out in the bill.

Small *vs.* Owings, 1 Md. Ch., 363-368.
Manchester *vs.* Matthewson, 3 R. I., 237, 260.
Crockett *vs.* Lee, 7 Wheat., 525.
Eyre *vs.* Potter, 15 How., 42.
Ferraby *vs.* Hobson, 2 Phillips Ch., 255.
Glascott *vs.* Lang, 2 Phillips Ch., 310.
James *vs.* McKernon, 6 Johns., 543.
Peckham *vs.* Buffam, 11 Mich., 529 (530).
Bradley *vs.* Converse, 4 Cliff., 366.

The reason for the rule that a court of chancery decrees only *secundum allegata et probata* is stated by Chancellor Johnson in Small *vs.* Owings (1 Md. Ch., 363, 368), as follows:

"This rule is necessary not only to prevent surprise, but the abrogation of it would enable the complainant to take from his adversary the benefit of his answer, which, if responsive to the averments of the bill, would require a stronger measure of evidence to overcome, than if the fact to be proved was not noticed in the pleadings.

"In the treatise of Mr. Justice Story, already referred to, sec. 264, the rule is pressed still further; it being there said, 'that if an admission is made in the answer, it will be of no use to the plaintiff, unless it is put in issue by the bill; and

the consequence is, that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings.' "

In *Manchester vs. Matthewson* (3 R. I., 237, 260), which was a suit for an accounting between alleged partners, the bill charged that certain property was conveyed to the defendant as trustee and receiver. The answer denied this, but on the hearing the complainant attempted to establish on the evidence a resulting trust.

The court said (p. 261):

"Whether, then, there be a resulting trust in the respondent, is not now the question made or to be tried. * * * Sufficient for this case is it, that the complainants have not proved the estate to be held on the trusts set out in the bill, but that this is disproved by the respondent's answer."

In *Eyre vs. Potter* (15 How., 42), which was a bill in equity filed by a widow, charging actual fraud and undue influence on the part of the defendants in procuring her signature to a contract whereby she abandoned her rights to her husband's estate for an inadequate consideration, the court, per Daniel, J., held that, on a failure of proof of actual fraud, no relief could be granted on the theory that the contract was procured through constructive fraud—and this, although the relief to be granted, apparently the cancellation of the contract and an accounting, would be the same in either case.

The court said (at page 56):

"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive

fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." Citing Price *vs.* Berrington, 7 E. L. & Eq., 254.

In *James vs. M'Kernon* (6 Johns., 543) a bill was filed for discovery and account charging that defendants had obtained possession of the personal estate of complainant's intestate and refused to deliver it to them. The answer set up an assignment to one of the defendants for purposes of collection, etc. It was attempted on the hearing to have the assignment set aside because of fraud, and the court below granted the relief asked. But the Court for the Correction of Errors *reversed* the decree of the court below on the ground that the relief given must be in accord with that prayed in the bill, and there was no allegation in the bill that the assignment or agreement was void because of fraud in its procurement. In delivering an opinion, Kent, C. J., said (at page 561):

"The good sense of pleading and the language of the books both require, that every material allegation of this kind should be put in issue by the pleadings; so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony, and frame interrogatories, in order to meet the question. Without the observance of this rule, the use of pleading becomes lost, and parties may be taken, at the hearing, by surprise.

"If a defendant by his plea, or answer, offered new mat-

ter, the complainant formerly used to reply specially, and the pleadings might go on, as at law, to a rebutter; but special replications are now out of use; and the plaintiff is to be relieved according to the bill. But if the complainant conceives, from any matter offered by the plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to the defence, or he may file such a supplemental bill (Mitf. 19, 255)."

Bradley vs. Converse (4 Cliff., 366), an important case in which eminent counsel were engaged, was ordered by Mr. Justice Clifford to be reargued on the sole question as to whether there was a variance between the pleadings and the proof.

In that case the bill of complaint proceeded upon the theory that the respondent undertook, on behalf of the railroad company for which complainants were assignees, to take up and pay the outstanding bonds of the Norfolk county railroad with funds which the railroad company placed in their hands in the shape of bonds. The bill charged that the respondents bought many of the bonds at less than par and charged the railroad company full value, and that they made extortionate charges.

The proof showed that the respondents acted in the premises without any authority whatever, and that they were accountable on other grounds than as agents or trustees. Mr. Justice Clifford held, in a carefully written opinion, that, although it was established by the proof that the respondents were accountable to complainants, it was on a different theory from that set up in the bill, and because of the variance the bill was dismissed without prejudice.

In *Crockett vs. Lee* (7 Wheat., 522, 526) Chief Justice

Marshall, in applying this principle in a case in which it was sought to establish in the proof a defect in title not alleged in the bill, said:

"The counsel for the appellant says it would be monstrous, if, after the parties have gone to trial on the validity of the entry, and have directed all their testimony in the circuit court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case."

It will be argued that this rule has no application to the present case for the reason that the bill alleged and the evidence established that Tracy was *trustee* for the complainants, and was accountable to them for the moneys which came into his hands, no matter what disposition he made of those moneys, whether he retained them in his own posses-

sion or whether he paid them over to Thomas M. Turner or any other person not legally entitled to receive them; that, in this aspect of the case, the allegations that Tracy *retained* the moneys received by him from Silas Turner, and that they have come into the possession of the defendants, are immaterial and therefore not required to be proved.

The *gist* of the present suit, it is contended, is Tracy's breach of trust, whether that is to be considered as the wrongful retention of the money, or the wrongful disbursement of it, and, having established a breach of trust, the complainants are entitled to the relief prayed.

The answer to this contention is twofold:

1. Assuming for the purposes of the argument, that there was a breach of trust on Tracy's part, the contention of appellees would be sound if in truth the breach of trust were solely and alone the gist of the complainants' right to relief; but in this case it is not.

The right to the relief prayed and the extent thereof depend as well on the *nature* of the breach of trust as on the breach of trust itself.

The liability and the extent of the liability of a trustee who wrongfully retains the trust fund in his own possession, so that at his death it comes, with all its increase, into the hands of his executors, is essentially different from that of one who makes a wrongful disposition of it to one not entitled to receive it, just as it is different, again, from the liability of a trustee who is guilty of negligence in the management of the trust estate.

If it were shown in the proof, as it is alleged in the bill, that the *whole* trust fund—principal, interest, and profits—continued in the possession of Tracy and has come into the

possession of the defendants, then, so far as the original property could be traced, the complainants would be entitled to that specific property, together with all profits made thereon; and if it could be shown that Tracy invested the proceeds of all of Silas Turner's notes in real estate, which had subsequently greatly increased in value, it is not doubted but that the complainants would be entitled to that real estate, whatever its value might be; and if, on the contrary, Tracy had while using due care lost any part of the trust property through no fault of his own, then the loss would have fallen, not on Tracy personally, but on the complainants.

This principle, indeed, has been applied in this very case at the instance and for the benefit of complainants, for the auditor found that Tracy's estate was chargeable with the *profits* made on the sale of the "Maryland Avenue lots," as explained above.

This illustrates what the object of the bill really was—to trace the trust property into the hands of the executors of the trustee, to seize the trust estate, "principal, interest, and profits," as demanded in the bill, in the hands of the executors, and to impress it with the trust for the complainants.

This is the case the defendants were prepared to meet, and this is the issue which alone should have been tried,—not the issues pertaining to another and different sort of liability to which Tracy may have been subjected—*i. e.*, the liability of one who made a *wrongful payment* of trust funds in his hands to one whom he was *led to believe* was authorized to accept them.

Again, the difference between the nature of the liability sought to be imposed on the estate of Tracy by the bill of

complaint and that to which it is actually subjected, according to the evidence (assuming that there was a breach of trust), is clearly illustrated by considering the situation of creditors of Tracy's estate, if there were any.

If it were true that the whole of the trust fund—principal, interest, and profits—had come into the hands of Tracy's executors, then the complainants would be entitled to the whole of that fund, no matter how large it might be and no matter whether it consumed the whole of Tracy's estate, to the exclusion of creditors.

But if, as is the case made out by the evidence, the complainants are merely entitled to an accounting of moneys expended, then the rights of creditors are better secured; for if they had specific liens on Tracy's property, it is clear that they would have priority over the claim of complainants, which would probably not be the case if his estate were to be impressed with the trusts demanded in the bill.

2. The second answer to the contention of appellees is found in the reasons which actuated them in framing their bill as they did.

It has been seen that the *fact* that Tracy paid over the bulk of the alleged trust fund to Thomas Turner was well known to complainants at the time of filing their bill, if not long before (Rec., p. 233).

Why, then, it may be asked, did the complainants sign and swear to a bill alleging as a *fact* (not a conclusion of law) that Tracy *retained* in his own possession the *whole* of the trust fund, "principal, interest, and profits," and that the same has come into the hands of the defendants, his executors, when they knew this was not the fact?

What was to be gained by framing a bill on a theory not supported by facts?

The answer is plain. It was for the very purpose of postponing the real issue, of raising an issue on the evidence, instead of on the pleading, of compelling the defendants *in their testimony* to assume the burden of proving that the payment to Thomas Turner by Tracy was a valid discharge to him. And this is what the defendants have in fact been compelled to do.

The proper course of pleading would have been, of course, according to the older mode, to have anticipated the defense of the payment to Thomas Turner, to have alleged the *fact* of such payment and to have averred that it was unlawful and not a valid discharge to Tracy. (This is *suggested* in the twenty-first paragraph of the bill (Rec., p. 8), but not done.)

Not having done this, the defendants properly assumed that the case was to be determined by the *issues raised by the bill and answer*—the fact of the retention of the trust fund in Tracy's hands and its coming into the hands of his executors—and not on the issues raised by the evidence—whether or not the payment of the trust funds to Thomas Turner was or was not a valid discharge to Tracy, under the laws of Louisiana, and whether this question was to be determined according to the laws of Louisiana, Virginia, or the District of Columbia.

Mr. Justice Hagner, in delivering the opinion of the court below, did not fully understand this contention of appellants. He says:

"The further contention of the defendants is that, as none of the specifics described and enumerated in the list given

by Tracy to Silas Turner ever came *aominatim* into the hands of his executors, therefore no decree can pass in respect to those specifics or their value in the present case, as against the estate of the culpable trustee" (Rec., p. 27).

It is apparent, of course, that the learned justice does not here meet our contention that, because of the *variance* between the pleading and the proof, because of the failure of the complainants to establish by proof the facts alleged in the bill on which the theory of the bill was based, the bill should be dismissed.

In disposing of this contention the Court of Appeals merely says:

"In our opinion its (the bill of complaint's) allegations are sufficient to warrant the consideration of all of the evidence and the entry of the decree in accordance therewith."

Rec., p. 422.

With due respect to the learned court from which this appeal is taken, this seems to us hardly an adequate answer to our proposition that the evidence, showing, as it does, that the "trust fund" in question *did not* come into the possession of the defendants, fails to support the allegations of the bill that said trust fund *did* come into the possession of the defendants; particularly where the nature of the liability sought to be imposed upon the defendants depends largely upon the very question as to whether or not the trust fund did or did not come into their possession.

Stated in another way, the question may be put thus:

Can the complainants, well knowing that the so-called trust fund did not come into the possession of the defendants, be permitted to state under oath that said trust fund

did come into their possession and so charge the defendants with a duty to account for it, "principal, interest, and profits"? And can it be said that the "allegations of the bill are sufficient to warrant the consideration of all of the evidence," where the evidence disproves those allegations?

It is submitted that the present case is distinctly one for the application of the principle of equity pleading set forth above, which, says Chief Justice Marshall (*Crockett vs. Lee, supra*), "is not only one which justice requires, but one which necessity imposes on courts."

II.

Philip A. Tracy was not a trustee for Silas H. Turner, as to the funds in Tracy's hands belonging to Turner, at or before Turner's death, nor after his death did he become trustee as to said funds for the complainants, the children of Thomas M. Turner, beneficiaries under the will of Silas Turner.

As we have seen, the theory of the complainants' bill is that the fund bequeathed to complainants by the will of Silas Turner was in Tracy's possession at the time of Turner's death and continued in his possession until his, Tracy's, death, and that it thereafter came into the possession of defendants, his executors.

As we have also seen, as to the greater part of this fund, this theory was unfounded in fact.

Under the first head of our argument we had occasion to make some inquiry as to the object of complainants in framing their bill as they did. We now wish to call attention

to another purpose which was apparently in the minds of complainants in presenting their case.

A simple demand for money had and received is not, of course, a matter of equitable cognizance. There must be, to enable a claimant to prosecute a money demand in a court of equity, a "trust fund," a trustee, and a *cestui qui trust*, or, owing to the existence of some *equitable* right, there must be some ground for equitable relief, as accounting, injunction, receiver, etc.

Now, as described in the bill, there exists, of course, a clear-cut *trust* in the funds which "have come into the hands of the defendant," and by reason of the existence of the trust a right to an accounting. By the bill an equitable title to the estate of Philip A. Tracy is made out. This was necessary to be done in order that the bill might not be demurrable, for, had the bill been framed in accordance with the *facts* as known to the complainants, it would have shown on its face that the case was not one to call into operation the powers of a court of equity, but was a simple demand by complainants against defendants for money had and received by defendants' testator, for the recovery of which there was to the complainants a full, adequate and complete remedy at law, with no element of a trust, express or constructive.

1. *Tracy was not trustee for Silas Turner as to the funds in his hands up to the time of his (Turner's) death.*

The only account of Tracy's agency for Silas Turner is found in Tracy's "Instructions to executors" (Rec., pp. 15 and 293).

"Some time in 1871, Silas H. Turner of Virginia, whom I had known for a long time, of his own volition and with-

out solicitation from me, came to the city and asked me to aid him in investing some twelve thousand dollars ($12,000) in real-estate notes. I consented and in a few weeks the whole amount was invested, and he took the notes home with him. The interest was payable semi-annually, and, for a time, he sent the notes by mail about the time the interest was due, so that it could be credited on the notes, to satisfy the maker. This became irksome and, after a time, he brought me the notes, keeping a list of them, and asked me to keep them to save him the trouble of sending them to me by mail whenever the interest was due. I kept the notes in an envelope with his name upon it, and about twice a year sent him a memorandum of interest paid, and when the amount reached several hundred dollars I would buy another note, and send him a memorandum of the same. Also when a note matured and was paid, I would buy another note, unless he needed the money, which he rarely did, and send him a memorandum of it. This condition continued until 1888, when he died in Virginia leaving his entire estate to the three minor children of his brother then living in Louisiana."

The relationship between these two men was not that of trustee and *cestui que trust*, but merely of principal and agent.

Ashley's Adm'r *vs.* Denton, 1 Little (Ky.), 86.
Adair *vs.* Winchester, 7 Gill. & J., 114.
Warner *vs.* McMullin, 131 Pa. St., 370.
Knox *vs.* Gye, L. R., 5 H. L., 656, 675.
2 Pomeroy Eq. Jurisp. (2d ed.), secs. 1044 and 1046.
Kershaw *vs.* Snowden, 36 Ohio St., 181.
Douglass *vs.* Martin, 103 Ill., 25.

"A trust is where there is such a confidence between the parties that no action at law will lie, but is merely a case for the consideration of a court of equity."

Stuart *vs.* Mellish, 2 Atk., 612.

Tested by this distinction, there was no element of a *trust* in the relations between Turner and Tracy beyond the *trust* that every principal has in his agent, every bailor in his bailee. Turner's confidence in Tracy was not "such a confidence * * * that no action at law will lie," for it will not be contended, we believe, that S. H. Turner might not have sued Tracy at law and recovered his property. Had the *legal title* to Turner's property been vested in Tracy, so that Turner would have been unable to assert his right and title thereto in a court of law, then, of course, there would have been "such a confidence * * * that no action at law will lie," and, consequently, a trust.

Lord Westbury, in Knox *vs.* Gye (*supra*), in clear language, points out the dangers of misusing the word "trust" and in extending its metaphorical to its legal sense. He says, in speaking of the supposed principle that a surviving partner is a *trustee* of the share of the deceased partner (p. 675):

"In like manner here the surviving partner may be called trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time. As between the express trustee and the *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man who is improperly and by meta-

phor only called a trustee, of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee,—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as metaphor."

The same distinction was clearly expressed in *Ashley's Adm'r vs. Denton* (*supra*), which was a suit in equity filed to procure the restoration of certain slaves which defendant had held for the use and benefit of complainant.

The court, in speaking of its jurisdiction, said (p. 88):

"It is true that uses and trusts are a favored part of the jurisdiction of the chancellor, and frequently he will, on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels, by loan or hire, would be swallowed up by courts of equity. * * * *It ought, then, to be confined to cases of controlling legal rights, vested and remaining in trustees created as such in some proper mode, and not to be extended to all cases of abused confidence.*" (The italics are ours.)

The same rule was applied in *Adair vs. Winchester* (*supra*), which was a bill in equity by an assignee in bankruptcy to recover a pledge placed with defendants by the agent of complainants; also in *Douglass vs. Martin* (*supra*), which was a suit in equity to recover a sum of money placed in the hands of a stakeholder. In the latter case the court said (p. 30) that, in order to constitute a trust:

"It (the act or agreement creating the trust) must either vest an equitable title in or create a lien in favor of the beneficiary and this must be either by agreement of the parties, or under such circumstances as equity will declare a lien exists."

In the present case, as between Silas Turner and Tracy, there was neither agreement nor any circumstances to create a trust, or even raise a presumption of one—there was a mere *agency*.

2. *Upon the death of Silas Turner, Tracy did not become trustee for complainants, the beneficiaries under Silas Turner's will.*

Upon the death of Silas Turner, the relation of principal and agent was, of course, terminated at once, and Tracy was, except as his duties were affected by Turner's will, in the position merely of holding funds belonging to Turner's *estate*.

But by his will Silas Turner bequeathed all his property to the four children of his brother, Thomas M. Turner (the complainants), and the will appointed "Philip A. Tracy to distribute the proceeds of said property equally between them" (Rec., p. 265).

Now, it is to be noted that this will did not make Tracy executor, nor did it, in terms, make him a *trustee*. No trust was created by the will. Tracy did not thereby acquire the legal title to Turner's property in his hands; he was given no power of investment or control over the property, and he was given no discretion as to the time or mode of payment. In short, there was imposed upon him, by Turner's will, the

simple legal duty of paying the money to the persons entitled.

For a breach of this duty the full, adequate, and complete remedy of the complainants was and is a suit at law, to be brought by an administrator, with the will annexed, of Silas Turner.

The case of *Doyle vs. Murphy* (22 Ills., 502) is in its facts, and in the application of the law, almost exactly similar to this.

In that case Catherine Byrne, in Ireland, in the conduct of her business, entrusted certain funds to Maurice Doyle, who acted as her agent. Doyle absconded with the funds entrusted to him and went to America in 1834. Catherine Byrne died in 1849, and by her will left her property to her daughter, Honora Murphy, and her husband. In 1851 Maurice Doyle died intestate at Springfield, Ill., and left a large amount of property. Honora Murphy and her husband filed a suit in equity against the administrator, heirs and next of kin of Doyle, asking for an account of the funds of Catherine Byrne that had come into his hands. By a reference to the auditor it was found that $17,000, principal and interest, was in the hands of Doyle's administrator, and the court, confirming the auditor's report, entered a decree against his estate for that amount. This decree was *reversed* on the ground that equity had no jurisdiction to declare the funds in the hands of the administrator subject to the trust, and that complainants had a full, adequate, and complete relief at law. In reply to the argument that Doyle was a trustee, the court says (p. 508): "That the court has such jurisdiction in cases of strict trust, there is no doubt. But it does not therefore follow, that the court will assume

jurisdiction in every case where a mere confidence has been reposed or a credit given." The court then goes on to show that in the ordinary affairs of life where a confidence is reposed or a trust entertained that such a trust is not thereby necessarily created as will authorize a court of equity to entertain jurisdiction. In such cases the remedy is by suit at law.

In reply to the argument that equity has jurisdiction on the ground that the money in the hands of Doyle was bequeathed by Catherine Byrne to Honora Murphy, the complainant, the court said:

"We have not been referred to any case, nor is it believed that any such exists, where it has been held, that where a testator bequeaths a debt due him to a legatee, that he may resort to a court of equity.

"* * * By virtue of this bequest from her mother, she (Honora Murphy) did not acquire the relation, to the administrator of Maurice Doyle, of a *cestui que trust*. She by that will became the executor if she obtained the letters testamentary, and thereby became the creditor of Maurice Doyle's estate."

It is submitted, on the authority of this case and on the well-defined principles of equity jurisprudence as laid down therein, that Tracy was never a *trustee*, as to the funds in his possession belonging to Silas Turner or his estate, for the complainants, and that a court of equity has no jurisdiction, in the absence of this ground of equitable interference, to grant relief to the complainants in this case.

The complainants should be left to their remedy at law, which is full, adequate, and complete.

III.

The payment made November 30, 1888, by Tracy to Thomas Turner as "natural tutor and agent for his minor children" (Exhibit T. M. T. No. 2, Rec., p. 221), was made in good faith by Tracy and at the solicitation and by reason of the representations of Turner and was a complete and valid discharge pro tanto to Tracy against subsequent demands made on him by the complainants.

The three propositions which we advance under this defense are:

1. The payment of November 30, 1888, by Tracy to Turner was made at the request and by reason of the representations of Turner, and was, on Tracy's part, made in good faith, and not with the purpose of personal profit.

2. According to the laws of Louisiana, Thomas M. Turner, as father of the complainants, had the right to the possession and enjoyment of the estates of his minor children during their minority.

3. Tracy's voluntary payment to Turner of the funds in his hands belonging to the complainants who lived in a foreign jurisdiction was valid, since, according to the laws of that jurisdiction, the person to whom the payment was made (the father) had the right to receive the money, and a receipt given by the father is a valid discharge and acquittance to Tracy.

These three propositions we will consider in their order:

1. THE PAYMENT OF NOVEMBER 30, 1888, BY TRACY TO TURNER WAS MADE AT THE REQUEST AND BY REASON OF THE REPRESENTATIONS OF TURNER AND WAS, ON TRACY'S PART, MADE IN GOOD FAITH AND NOT WITH THE PURPOSE OF PERSONAL PROFIT.

It will be necessary to examine more closely the circumstances under which this transaction took place.

On the 28th of September, 1888, Thomas Turner, *accompanied by his lawyer, Eppa Hunton,* came to Washington bringing with him the list of notes, Exhibit E. H. T. No. 22. They found Tracy at the post-office, where he was employed as a clerk, and presented the list to him. Turner describes this interview as follows:

"I showed him this paper and told him my brother had told me he had these notes described in his list in his possession for my brother, and I wanted to know about it. He said it was all correct, that he had the notes, all of them, in his possession, and that the notes were as good as gold, I believe was his expression.

"He then told me he had just gotten leave of absence and was on the eve of going for a few weeks into the country for the benefit of his health, and that I could return to Virginia, and when he returned from the trip, he would notify me and I could come to Washington and we would have a settlement of the matter. He then turned to me and remarked that possibly I would need some money to discharge the funeral expenses, etc., and handed me some money," $439.25.

Tracy had not, before that time, been informed of the death of Silas Turner (Rec., pp. 107, 108, *et seq.*).

Thereafter Turner went back to Virginia and stayed with his relatives until he received word about a month later from Tracy to come to Washington for the settlement. He came and met Tracy at the National Hotel. At their conferences Tracy produced a second list of notes (Ex. T. M. T. No. 1) and asked Turner whether a settlement according to that list would be satisfactory. Turner took this list and compared it carefully with the one in his possession (Ex. E. H. T. No. 22). He found the sum total of the second list to be less by several thousand dollars than that of the first list, and, as he called it, "some substitution of notes." He objected to this and refused to settle on the basis of the second list. Tracy thereupon told him that "he would not qualify as executor of the will and he said that if I attempted to qualify as guardian or administrator, he was satisfied the heirs of my brother here in Virginia would contest the will. He furthermore told me there would be a good deal of cost attached to it, that I would have to give a bond, it seems to me, of double the amount of the whole estate, and that would be difficult for me to do, he said, and he also said there would be a tax on it, a legacy or inheritance tax, I understood it—I did not know the law here—which would amount to several thousand dollars; and he wound up by stating that, all that taken into consideration, this amount would be more, perhaps, than I would get clear if I were to administer on it. He then remarked that if I would settle by this list, he would turn the property over to me without having anybody appointed as executor or administrator or guardian, and that we could put the notes in bank here and have them collected, and I could get the means away from here

as quick as possible, and perhaps that would prevent the other heirs of my brother in Virginia from attempting to break the will" (Rec., pp 111, 112).

To these arguments Thomas Turner yielded, as he says, and he signed the receips, Exhibit T. M. T. No. 2 (Rec., p. 221), as "natural tutor and guardian of my minor children," which is like the list, Exhibit T. M. T. No. 1, in all respects, took the notes from Tracy and deposited them in the Second National Bank. Turner's account with the bank is in evidence (Ex. T. M. T. No. 23, Rec., p. 243); also the checks by which money was drawn out (Ex. T. M. T. 23 (24), pp. 246–261).

The only other account of the payment of this fund to Thomas Turner appears in Tracy's "Instructions to executors" heretofore referred to. He says:

"In his will he named me to settle up the estate and divide the money among the children; but, as the laws of Virginia require two witnesses to a will, and says neither of them shall be an executor I could not qualify, and as the father if appointed could not have given the bond, I handed him the package of notes, advised him to deposit them in the Second National Bank of Washington, D. C., which he did, and agreed to look after them and have them all paid, he being out of the city" (Rec., p. 15).

We submit that Turner's testimony to the effect that the payment to him was made at Tracy's request, and because of his representations as to the probable cost of administration, the necessity of giving a bond, the payment of a legacy tax and the probability of Silas Turner's relatives contesting the will, was a gross contortion of the truth in obvious contradiction to the clearest inference from admitted facts.

(*a.*) As to the threatened contest of the will by Silas Turner's relatives, Turner swore that just after the death of Silas Turner he did not communicate to his relatives in Virginia knowledge of the will of Silas Turner, but concealed it from them (Rec., p. 115).

The truth was that almost immediately after the death of Silas Turner *his will was read aloud by Thomas M. Turner in the presence of Robert S. Rust, Justin E. Sowers, and W. H. Kerfoot* (Rec., pp. 302, 315).

Turner's false statement was evidently made for the purpose of making the court believe that, his relatives having no knowledge of the will from him, the threat that they would contest the will must have originated with Tracy, and was a part of his scheme to extort money from Turner.

It is obvious, on the contrary, that it was Turner who, fresh from his relatives in Virginia, among whom there was some talk of contesting the will, imparted this information to Tracy as an inducement to pay over the money at once and without the delay incident to the appointment of an executor.

(*b.*) As to Tracy's alleged representations as to the cost of probate, necessity of giving bond, and legacy tax, it is far more probable and more consistent with the facts that Turner used these arguments to Tracy than Tracy to Turner.

Turner had been a clerk of a county court in Louisiana. Therefore the legal presumption that he knew the law is strengthened into a presumption of fact.

Furthermore, Turner was acting under the advice of his lawyer, Eppa Hunton. Therefore he would almost necessarily be completely informed as to the cost of being ap-

pointed executor, as to the necessity of giving bond, and as to the payment of the inheritance tax. It is impossible to believe that he could have consulted with Eppa Hunton about the probate of the will without discussing these very things that he says Tracy told him about.

It is true that Tracy, in his "Instructions," says that the reasons which actuated him in handing the fund over to Turner were those which Turner sets forth, but there is nothing in his "Instructions" to show that he did not derive his information as to these matters from Turner, as was natural.

(*c.*) But Turner's crowning piece of effrontery, which characterizes all his testimony, is his account of signing the receipt, Exhibit T. M. T. No. 2, as "natural tutor and agent for my minor children."

When asked what he meant by signing as "natural tutor and agent for my minor children" he said:

"*I did that at Mr. Tracy's dictation, his suggestion.* I supposed he meant (I know I meant) that I was their natural protector. That was all" (Rec., p. 137).

Can this Court believe that signing as "natural tutor" was a suggestion of Tracy's rather than Turner's own idea? In all probability Tracy had never heard of any other use of the word "tutor" than as "teacher;" but under the laws of Louisiana, whence Turner had just come and where he had been clerk of a court, the word "tutor" has its own special and peculiar significance, and "*natural* tutor" has a still more special significance.

It is impossible to escape the conclusion that Turner's signing as "natural tutor" was a part of his scheme of get-

ting the funds of Silas Turner's estate into his own hands, *and that by so signing he induced Tracy to believe that payment to him was lawful and regular.*

But it is pointed out by counsel for complainants, as evidence that Tracy extorted from Thomas Turner a large part of S. H. Turner's estate, that Tracy, as appears by his own confession, in his "Instructions" and in his letters to Erle Turner and to Mrs. Turner, retained for his own benefit and behoof a large sum of money.

It is difficult to reconcile the fact that Tracy always freely admitted to Erle and Mrs. Turner that he held some property of the S. H. Turner estate for the children with the contention of counsel that he *stole* this plunder or took it by force and threats. A thief does not openly admit possession of stolen goods.

The simple fact is that Tracy, as he stated in his "Instructions," handed over to Thomas *most* of the estate of S. H. Turner. He retained in his possession *only* the property invested in the "Maryland Avenue lots" amounting to $1,800. This item appears in Exhibit T. M. T. No. 2.

Out of the property so retained Tracy paid over to Erle at different times $1,435 (Rec., pp. 212, 213).

Another argument of appellees to show bad faith on Tracy's part and the profit he made out of this transaction is found in his alleged charge of $6,000 as "commissions."

There is no evidence that Tracy actually received $6,000 or any other sum as a commission. The only reference to it by him is in a letter to Thomas Turner dated May 7, 1892, in which he says:

"As I am now all alone in the world and have not much use for much money I have thought something of transfer-

ring to Miss Henrietta a part or perhaps all of the commission I charged on your brother's estate (5%) as she was left out in the will, and is poor as I understand it, and getting along in years.

"If you will confer with her upon the subject, and ask her to write to me, I think the arrangement can be arranged.

"This amount of my charge for attending to the business for 16 years ($120 a year) will stand" (Rec., p. 230).

Turner states that Tracy never said anything else about his commission, either before or after that letter (Rec., p. 118). That he ever actually received or retained any sum of money as commissions does not appear. Certainly the mere fact that he said he *would* charge a commission, or that the amount of his charge *would stand*, is not sufficient proof to establish the charge, over and above the other moneys which he is shown to have possessed and for which he is accountable.

Counsel for appellees sought to show, in the court below, that Tracy retained $6,000 in his own hands, as plunder, by comparing the sum total of the list of notes, Exhibit E. H. T. No. 22 (the list Thomas Turner says he found among S. H. Turner's effects), with the sum total of the list, Exhibit T. M. T. No. 2 (the receipt signed by Thomas Turner), and he points out that the difference between these two lists is approximately $6,000.

The complete answer to this is that, as we will demonstrate in another place (*infra*, p. 103 *et seq.*), the list, Exhibit E. H. T. No. 22, is not entitled to the slightest weight as evidence to fix the amount with which Tracy's estate is to be chargeable.

The Court should, we submit, reject it entirely as a basis of charge against Tracy.

Because of his obvious misstatements of fact, because of his interest in the cause, we submit that Thomas Turner's statements must be taken most strongly against him; and in solving the mystery as to the motives of the payment of $26,000 by Tracy to Turner we must give every fair inference from the established facts in Tracy's favor, who is not here to speak for himself.

From these facts every inference points to the conclusion that it was Turner who induced Tracy to pay over the money to him, urging as reasons the cost of probate and administration, the necessity and difficulty of giving bond, the payment of the inheritance tax, and above all the *chief and persuading reason that, under the laws of Louisiana, Turner, as "natural tutor for his minor children," was competent to receive money for them, and to give a valid receipt therefor.*

This brings us to our second proposition:

2. ACCORDING TO THE LAWS OF LOUISIANA, THOMAS M. TURNER, AS FATHER OF THE COMPLAINANTS, HAD THE RIGHT TO THE POSSESSION AND ENJOYMENT OF THE ESTATES OF HIS MINOR CHILDREN DURING THEIR MINORITY.

The following are the provisions of the Revised Civil Code of Louisiana of 1870, in force in 1888, at the time when Turner, on behalf of his children, received the moneys belonging to S. H. Turner's estate from Tracy, governing the rights of the father to the property of the children:

Book I, title VII, ch. 5, under the heading *"Paternal authority:"*

"Article 221 (art. 267). The father is, during the marriage, administrator of the estate of his minor children.

"He is accountable both for the property and revenues of the estate, the use of which he is not entitled to by law, *and for the property only of the estate, the usufruct of which the law gives him.*

"This administration ceases at the time of the majority or emancipation of the children."

"*Article 222.* Property belonging to minors, both of whose parents are living, may be sold or mortgaged, and any other step may be taken affecting their interest, in the same manner and by pursuing the same forms, as in the case of minors represented by tutors, the father occupying the place and being clothed with the powers of tutor.

"An undertutor *ad hoc* shall be appointed by the court, contradictorily with whom the proceedings shall be carried on."

"*Article 223* (art. 239). *Fathers and mothers shall have during marriage the enjoyment of the estate of their children until their majority or emancipation.*"

Article 224 (art. 240). The obligations resulting from this enjoyment shall be:

(1.) The same obligations to which usufructuaries are subject.

(2.) To support, to maintain, and to educate their children according to their situation in life.

Under the heading "Of Usufruct," etc., Book 2, title III, the following definitions and rights and liabilities of usufructuaries are set forth:

"*Article 533* (art. 525). Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing.

"*Article 540* (art. 532.) Usufruct may be established by

all sorts of titles, by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will, and even by operation of law.

"Thus a usufruct to which a father is entitled on the estate of his children during the marriage is a legal usufruct.

"*Article 589* (583). Fathers and mothers who enjoy the legal usufruct of the property of their children are bound to support the expenses of all suits concerning that property, in the same manner as if they were the owners of it."

It is clear from these plain provisions that, by the law of Louisiana, Thomas Turner *was vested with the usufruct of his children's estate* and the right to take possession of and administer it.

But it is pointed out by counsel for appellees that, as father having the right of enjoyment of his children's property, Thomas M. Turner was, by article 224 of the Code, subjected to the *"same obligations to which usufructuaries are subject."*

Those obligations are found in articles 557 to 560, in Book II, title III, chapter 1, of the Revised Civil Code, and they consist principally in the filing in a certain formal way of an inventory by the usufructuaries and the giving of security for the faithful care of the property out of which the usufruct arises.

But according to article 560 the giving of security is expressly rendered unnecessary in the case of a father and mother having the legal usufruct of the estates of their children.

"Article 560 (art. 553). Neither father nor mother having the legal usufruct of the estates of their children * * * is required to give this security."

The only substantial limitation on the parents' enjoyment of their children's property is found in the following provisions of the Code:

"*Article 589* (art. 583). Fathers and mothers who enjoy the legal usufruct of the property of their children are bound to support the expenses of all suits concerning that property in the same manner as if they were the owners of it."

These provisions of the Code are construed and explained in the following cases:

Cleveland *vs.* Sprowl, 12 Rob., 172.
Handy *vs.* Parkinson, 10 La., 92.
Greenwood *vs.* City of New Orleans, 12 La. Ann., 426.
Snow *vs.* Copley, 3 La. Ann., 610.
Renfroe *vs.* Gates, 7 La. Ann., 569.
Succession of Allan, 48 La. Ann., 1240.

In *Cleveland vs. Sprowl* (*supra*) the question as to the infant's lien or mortgage on the property of his father as security for his faithful administration of the children's estate was raised, and, in pointing out that the parents are expressly exempted from giving security, the court said:

"Now, it is well known, that no tutorship exists, during the marriage, over the children issued from it, but that a child remains under the authority of his father and mother until his majority or emancipation. Civ. Code, art. 234. The father is, during the marriage, administrator of the estate of his minor children; he is accountable both for the property and revenues of the estate, the use of which he is entitled to by law, and for the property only of the estates, the usufruct of which the law gives him; and such admin-

istration ceases at the time of the majority, or emancipation of the children. Art. 267. The natural tutorship only takes place after the dissolution of the marriage, by the death of either of the spouses, and belongs of right to the surviving one. Art. 268. Thus it is clear, that the legal mortgage resulting from the tutorship, is not applicable to the administration of the minor's property, given by law to the father, during the marriage. He is not a tutor; his duties and responsibilities are very different; and the law does not appear to have intended, that while the minor's estate remains under his father's administration during the marriage, his child should have a legal mortgage upon his father's property, as a security for the said administration. He is accountable, it is true, for his children's property and revenues; but art. 239 says, that fathers and mothers shall have, during the marriage, the enjoyment of the estate of their children; and art. 240 informs us, that the obligations resulting from this enjoyment shall be *the same obligations to which usufructuaries are subjected*, and to support, to maintain, and to educate, their children according to their situation in life. Now, on referring to art. 551, we find that a usufructuary must give security that he will faithfully fulfill all the obligations imposed on him by law; (art. 522;) that, in place of such security, he may give a special mortgage on his real property; (art. 555;) but art. 553 provides that '*neither the father nor mother having the legal usufruct of the estate of their children, is required to give this security;*' and they are consequently not bound to give a special mortgage.

"We must, therefore, conclude, that our law allows no mortgage on the property of the father, as a security for his faithful administration of his children's estate during the marriage; that the father and mother have the enjoyment of the children's estate, without being bound to furnish any security; and that the judge, *a quo*, did not err in refusing to recognize the mortgage rights prayed for by the appellant. It may be a hard case; and we should perhaps, as men, be

disposed to sympathize with the feelings expressed by one of the appellant's counsel in his brief, and deplore the situation of a poor orphan whose estate has been squandered by his father, and who is left remediless after the latter's death. But such is the law. As judges we are bound to obey it; and we do not feel authorized 'to strain it a little,' as the counsel suggests, even were it for the sake of remedial justice."

In *Handy vs. Parkinson* (*supra*) the creditors of a surviving parent (the father) sought to levy execution on the property of the children in which he had, as it was claimed, the usufruct. But the court held that the father had this usufruct only *during marriage*, and that after the death of one of the parents the property is vested in the *tutor* of the child.

In *Greenwood vs. City of New Orleans* (*supra*) a testator bequeathed a share of his estate to the heirs of a woman (who were her children), she to have the usufruct of it during her life. During the minority of the heirs there was a suit entered which resulted in a compromise judgment against the property in question, in which suit the infants were not represented. It was contended that they were not bound by the judgment. The court *held,* however, that they were bound because their mother was a party to the suit or represented in it, and she was entitled *by law* as well as by the will to the usufruct of the estate.

In *Snow vs. Copley* (*supra*) the right of Snow to act for his minor children was disputed on the ground that the mother and father being both living, he could not be clothed with the capacity of tutor. The court said: "It is true that S. is not a natural tutor; but as the father of the minors he

is, during the marriage, the administrator of their estate and competent to institute a judicial proceeding for its protection."

In *Gates vs. Renfroe* (*supra*) it was said: "Both under the civil and common law minors, while both parents are living, are subject exclusively to the authority of the father, who administers their property and is bound to provide for them and protect them in their person and rights."

Counsel for appellees point out that by *Article* 3350 it is provided:

"Before fathers and mothers, who by law have administration of property belonging to their minor children, shall be allowed to take possession of such property and enjoy the profits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded on the mortgage books of every parish in the State where they or either of them may have immovable property."

But this provision is found in Book III of Modes of Acquiring Ownership of Things, title XII of Mortgages, ch. 2 of Inscription of Mortgages, and sec. 1 of the Mode and Effect of Recording Mortgages.

Construed, as it must be, with the context in which it is found, it is obvious that this provision is not meant to limit the father's right to take possession of and administer his children's estate except in order to create a lien or mortgage on *his own* estate for the benefit of his children.

The father is still not required to give *security* for the faithful administration of the estate.

It is to be observed that, although certain formalities are prescribed before the father can take possession of his children's estate situated in Louisiana, such as the making and filing of an inventory, the right and title of the father to so take possession and administer is derived, not from an act of a court, but from the law itself. Immediately upon the children's becoming vested with the right of property, the father, by the act of the law, becomes vested with the rights of possession and use as usufructuary. While the father may not be aided in obtaining possession of his children's property situated in Louisiana by the courts until he has complied with the formalities prescribed by law, nevertheless his title as usufructuary is *complete*, without the intervention of the law, immediately upon his children's becoming entitled to property. No bond is required to be given or inventory filed before he becomes vested with the rights of usufructuary. This the law does for him *ex proprio vigore*. It is only when he attempts to collect property *in Louisiana* that he must comply with the requirements of filing an inventory. This distinction is important, for in the first place it is to be observed that, as to property situate outside of Louisiana, the extent and nature of which is unknown to the father, it is impossible to file an inventory until he gets the property into Louisiana. And, in the second place, if it be true, as we think is clear from the laws of Louisiana cited above, that the father is, by that law, clothed with *rights*, as usufructuary, in the property of his children, then, as such usufructuary, he is entitled to demand and receive, and may give a good acquittance for, the property of his children situate in a foreign jurisdiction.

This brings us to our second proposition under this head-

ing of our argument, which is, stated more broadly than above:

3. A VOLUNTARY PAYMENT BY A PERSON HAVING IN HIS HANDS FUNDS BELONGING TO PERSONS LIVING IN A FOREIGN JURISDICTION IS VALID, IF, ACCORDING TO THE LAWS OF THAT JURISDICTION, THE PERSON TO WHOM THE PAYMENT WAS MADE HAD THE RIGHT TO RECEIVE THE MONEY; AND A RECEIPT GIVEN BY SUCH PERSON IS A VALID DISCHARGE AND ACQUITTANCE TO THE PERSON SO PAYING THE MONEY.

We wish at once to be understood as not controverting the principle that administration when had at all must be had within the jurisdiction in which a testator's will is filed, or within the jurisdiction in which his property was situated, and that, as to personalty, the law of the domicile of the owner applies.

This principle, however, has no application to the present case.

Beyond the filing of Silas Turner's will for probate, there was no administration of his estate in Virginia, and none in the District of Columbia, where the great bulk of his property was situated at the time of his death.

For excellent reasons, the fear of a contest of a will, the cost of administration, and the desire to get the property away from the grasp of Silas Turner's relatives in Virginia, all of which has been more fully explained above, it was agreed between Tracy and Turner, acting in his capacity as administrator of the estate of his children, that there should be no formal administration, but that, *Thomas Turner paying all the debts of the decedent*, the estate should be settled out of court.

Courts look with favor upon the private settlement of estates, where there are no debts or where the claims of creditors are satisfied.

Akin *vs.* Akin, 78 Ga., 24.
McCracken *vs.* McCaslin, 50 Mo. App., 85.
Roberts *vs.* Messenger, 134 Pa. St., 298.
Foote *vs.* Foote, 61 Mich., 181.
Filbey *vs.* Carrier, 45 Wis., 469.
Burton *vs.* Brugier, 30 La. Ann., 479.

We do not deny that if Tracy had refused to pay over the moneys in his hands to Thomas Turner it would have been necessary for Turner to have qualified as administrator and to have complied with the formalities made by the laws of the District of Columbia prerequisites to the collection of assets by suit in this District.

But these principles leave untouched the heart of our argument, that Tracy's *voluntary payment* to Turner, authorized by the laws of Louisiana, the domicile of the owners of the funds, to demand and receive it, was a valid payment.

The case is exactly similar to those involving payments to foreign executors, in which it is almost uniformly held that a voluntary payment to a foreign executor is a good discharge to the person making the payment, even as against a subsequent demand by an executor appointed by the court in the jurisdiction in which the property was situated.

Doolittle *vs.* Lewis, 7 John. Ch., 45.
Williams *vs.* Storrs, 6 John. Ch., 353.
Parsons *vs.* Lyman, 20 N. Y., 103.
Bank *vs.* Sharp, 53 Md., 521.
Wilkins *vs.* Ellitt, 9 Wall., 740.
Rand *vs.* Hubbard, 4 Met. (Mass.), 252.

Hutchins *vs.* Bank, 12 Met. (Mass.), 421.
Stevens *vs.* Gaylord, 11 Mass., 256.
Trecothick *vs.* Austin, 4 Mason, 6, 33.
Mackey *vs.* Coxe, 18 How., 104.

In *Doolittle vs. Lewis* (*supra*) the question presented was whether the administrators of a mortgagee with powers of sale, living in Vermont, were authorized to sell lands in New York under the power, and whether it was necessary to appoint executors in New York. Chancellor Kent held that it was not, because the matter was not jurisdictional, but was one of private agreement.

"An executor or administrator of a creditor dying in another State and becoming lawfully possessed, as part of his assets, of a bond given and secured upon lands in this State, is competent, as I should apprehend, to receive payment and give an acquittance without first resorting to the courts of probate here. * * * And is not the policy of the law sufficiently answered when our courts refuse to lend their assistance to any authority not derived from our own laws touching the administration and distribution of assets? If the parties can transact their own business *according to their own agreement, without asking the aid of our courts, why may they not lawfully do it?*"

In *Williams vs. Storrs* (*supra*) Chancellor Kent said that a voluntary payment by a debtor to a foreign administrator would protect him (p. 357).

In *Parsons vs. Lyman* (*supra*), where one of the questions was, whether a Connecticut administrator could collect (without suit) assets of the estate in New York, the court by Denio, J., after pointing out that personal property has no locality, but is subject to the law which governs the person of the

owner, and that an executor may not maintain a suit in a foreign jurisdiction, says:

"But, if residents of this State have in their possession property which belongs to a party domiciled abroad, or are indebted to him, they may, of course, recognize any valid title claimed under him arising out of an act in pais, by testament or by succession upon intestacy, and *may voluntarily deliver over the property, or make payment of the debt.*"

The reasons for this rule are fully explained and *Doolittle vs. Lewis* and *Williams vs. Storrs* are cited.

In *Bank vs. Sharp* (*supra*), a bank in Maryland having stock belonging to decedent, who lived in Indiana, delivered it over to her executor, duly appointed by the courts of Indiana, although ancillary letters were not granted in Maryland. Subsequently suit was brought against the bank for the stock so paid over, by an executor appointed by the courts of Maryland. But the court held that the first payment was a valid discharge of the obligation, following the rules laid down in the preceding cases and in Wilkins *vs.* Ellitt. The court further holds that the validity of such payment does not depend, as contended, upon the non-existence of debts against the deceased in the State in which payment is made.

In *Wilkins vs. Ellitt* (*supra*), a leading case, one Quarles, a resident of Alabama, died there, and Goodloe took out letters of administration. Wilkins, a resident of Tennessee, owed a sum of money to Quarles, and after his death paid it over to Goodloe. Subsequently a local administration, in Tennessee, was granted to Ellitt, who sued Wilkins for the money alleged to have been wrongfully paid over. It was

held, reversing the lower court, relying on the cases cited above, that the voluntary payment to a foreign administrator was a valid discharge of the debt.

In *Rand vs. Hubbard* (*supra*) the executors of testator's estate under a will proved in New York sent a note payable to testator to a notary in Massachusetts for protest. The note was presented to the debtors (endorsers) in Massachusetts and was dishonored. Subsequently an executor *c. t. a.*, appointed in Massachusetts, sued the endorsers. The defense was that there had been no legal protest of note. The fundamental point to be decided was whether, if endorsers had paid the note to the executor before the probate of the will in Massachusetts such payment would be a valid discharge of the obligation as to them. The court held by Shaw, C. J., that such payment would be good. In a very careful opinion he admits that for some purposes there may be a distinction between executors and administrators with regard to the validity of such payment, but strongly intimates that such distinction is not real and would not now be taken by the courts (pp. 255-256).

In *Hutchins vs. Bank* (*supra*) the testator, domiciled in New Hampshire, left his property to his wife (subsequently his executrix) with directions not to dispose of stock in a certain bank in Boston unless necessary. After her death the stock was to go to certain relatives. After several years she sold this stock and it was transferred on the books of the bank. Subsequently an administrator *d. b. n.* was appointed in Massachusetts and he brought suit against the bank for the alleged wrongful transfer of the stock. Shaw, C. J., said that question of liability of the bank did not depend on its negligence in not knowing of the provisions of the will and in not

seeing to their execution, but upon the right of the executor to demand personal property situate in Massachusetts, and to give a valid discharge therefor. And the court held that the executor had this right, that the receipt given by him was a valid discharge, and that the bank was not liable to the administrator *d. b. n.* appointed in Massachusetts.

After pointing out that an executor has the legal interest in the goods and chattels of the deceased, the court says:

"If, therefore, such an executor can take possession of goods and effects in the hands of a bailee or if he can collect a debt due from a debtor in another State, without the necessity, in either case, of commencing a suit, he has authority to do so, and may give a good acquittance and discharge."

In *Tricothick vs. Austin* (4 Mason, 16, 33) (1825), Story, J., stated that before the American Revolution voluntary payments of debts and receipts under foreign administrations were of unquestionable validity and released the debtors from further claim, and such payments were effectual in the United States; also after the Revolution, upon principles of national amity, relying upon Atkins *vs.* Smith and Doolittle *vs.* Lewis.

Atkins *vs.* Smith (2 Atk., 63) was a decision by Lord Chancellor Hardwicke, as follows:

"It was said in this cause by Lord Chancellor that ecclesiastical jurisdictions are limited within their particular district, and an administration taken out here will not extend to the colonies in America; but if an executor sends over an exemplification of probate to Maryland, or any other colony, the person who is employed as an agent there by the executor, may, by letter of attorney from him, collect in the effects of the testator, and he is chargeable as much as if the executor had got them himself."

The rule deducible from these authorities and applicable to the case at bar is that Tracy's voluntary payment to Turner, as father, who was authorized under the laws of Louisiana to demand and receive the property of his children, wherever situate, was a valid discharge, *pro tanto*, to Tracy against the subsequent demands made by Turner's children on Tracy.

In meeting this contention, the Court of Appeals says:

"4. There is no support for the contention that Tracy was relieved of any part of his responsibility to the complainants by the payment to Thomas M. Turner, and the receipt therefor executed by the latter as natural tutor and agent of his minor children. It is not pretended that there was any authority for the receipt of the fund either under the laws of Virginia, where Silas H. Turner lived and died, and where his will was probated, or under the laws of the District of Columbia, where Tracy resided and where the fund was deposited. Even if resort could be had to the law of Louisiana, where the complainants then lived, we find nothing in the articles of the code of that State, which have been brought to our attention, that empowered their father to receive the fund as their tutor, guardian, or agent" (Rec., p. 423).

It is, of course, true that, according to the laws of Virginia and of the District of Columbia, there was no specific authority for the receipt of the fund in question by Thomas Turner, the father of the persons entitled, nor, under those laws, was there any authority to Tracy to pay over the funds to Turner *as father*. But, as we respectfully insist, this is no answer to our contention that:

(1.) Thomas Turner, as father, was entitled to demand and receive the property of his minor children wherever

situate, since the law of Louisiana made him the "administrator of the estate of his minor children" (Code, Art. 221), and since that law gave him and his wife, during marriage, "the enjoyment of the estate of their children until their majority or emancipation."

(2.) Turner being so vested with the right to receive the funds in question, Tracy's voluntary payment to him and Turner's receipt constituted a valid discharge to Tracy of all future demands on the part of Turner's children, just as though Turner, instead of being the father of the children and on that ground entitled to receive the funds, were an executor or administrator duly appointed.

We find no answer to these plain propositions either in the opinion of Justice Hagner (Rec., pp. 26–33) or in the opinion of the Court of Appeals (Rec., pp. 410–425).

IV.

The complainant Erle Turner is barred from the relief prayed by his acquiescence in the alleged breach of trust—the payment by Tracy of the funds in his hands to Thomas Turner—and by his laches in prosecuting his claims.

1. *Facts pertaining to Erle Turner's knowledge of alleged breach of trust.*

In apparent anticipation of the defense of acquiescence and laches, the complainants framed their bill on the theory, unfounded in fact, that the whole of the "trust fund," so called, continued in Tracy's hands to the time of his death, and then came into the hands of his executors; and they, the complainants, were ignorant of any other facts pertaining to the "trust fund."

In paragraph 19 of their bill they allege:

"Complainants further show that they were in entire ignorance of all facts relating to said trust estate from the time of Silas H. Turner's death until about September, 1898, when the complainant, Erle H. Turner, accidentally learned of the death of said Tracy as hereinafter stated, and immediately engaged counsel to ascertain their rights. That these complainants resided in places remote from Washington. * * * That during all the time since the death of said Silas H. Turner these complainants have been without financial means and too poor to come to Washington and too ignorant of any facts to be able to advise with counsel, and that they were further induced to inactivity by the representations made by Tracy, to their mother and the complainant, Erle H. Turner, that the trust funds were invested in land or in notes which were during all said time unsalable and uncollectible; *and furthermore complainants were lulled into security by the assurances made by said Tracy to complainant Erle H. Turner, that he, Tracy, was doing the best possible for the interests of all these complainants, without once having denied the existence of the trust estate or their rights and his obligations in the premises with reference to said trust estate.*"

These allegations were not founded on facts, and were known at least to the complainants, Erle and Wilmer Turner, to be unfounded in fact at the time the bill was signed and sworn to.

The evidence shows that Erle knew for several years prior to the filing of the bill that Tracy had turned over the bulk of Silas Turner's estate to his father.

Erle also knew that Tracy, in the letters referred to in the 19th paragraph of the bill, referred only to a small part of Silas Turner's estate which he admittedly retained in his

possession, and which is probably represented by the "Md. Ave. lots" in Exhibit T. M. T. No. 2.

Erle Turner's testimony on direct examination was in substance as follows:

While he was living with the rest of the family at Minden, La., and while his father was in Virginia (September, 1888) his mother received a letter from his father, which was either shown or read to Erle, in which he stated that Silas Turner was dead and had left all of his property to his father (Rec., p. 45).

He first met Tracy in the National Hotel in Washington in 1891, where he was introduced to him by his father, and that after that he saw him occasionally and corresponded with him (Rec., pp. 45–46).

He went from Washington to Philadelphia, and returned to Texas two years later to see his mother, which was the first occasion of seeing his father after the Washington visit. He did not see his father again until a day or two before the taking of his deposition.

After Silas Turner's death and up to the Tuesday before his deposition was taken, he never had any conversation with his father with reference to Silas Turner's estate (Rec., p. 46).

His father wrote Tracy, however, shortly after April, 1891, to pay him, Erle, "so much money," certifying that $2,500 (he thinks), or more, of Silas Turner's estate had been invested in lots in Maryland avenue, which order Erle lost (Rec., p. 47).

Erle first learned that Silas Turner left his estate to the children of Thomas Turner, and not to Thomas Turner, from Tracy in conversation (Rec., p. 47), but Tracy never

told him of what Silas Turner's estate consisted (Rec., p. 53).

In April, 1891, Erle had a "settlement" with his father, by which his father gave him a check on the Second National Bank of this city, and a note, amounting, together to $1725, being Erle's share of the harvest of the Texas farm, under their agreement. He says he did not know where his father got that money, as "it was of no importance to him" (Rec., pp. 54–55).

On cross-examination Erle testified in substance as follows:

His first knowledge that he and his brother and sisters were beneficiaries under Silas Turner's will was obtained from Tracy in Washington, in the spring of 1891, "later than April."

He did not ask him how large the estate was or what it consisted of (Rec., p. 63).

His father had *concealed* the fact that the children had any interest in it (Rec., p. 63).

Erle thinks Tracy told him he had the estate invested in real estate (Rec., p. 63), but he did not know how much it was, or what it consisted of, and never inquired.

After 1891, when Erle says he got his information as to the nature of Silas Turner's will and estate, he wrote to his father about it, but does not know what he said, nor what his father replied, *but he never asked his father for any accounting, nor did he communicate his knowledge to his brother and sisters* (Rec., pp. 64, 66, 67, 85, 92, *et passim*); and this although on two distinct occasions he visited his father—once in Virginia and once in Texas—and spent at least two weeks with him each time (Rec., pp. 72, 73).

Appellants offered in evidence several letters from Erle to

Tracy, most of which are concerned with Erle's troubles with a woman in Philadelphia, and with the money in Tracy's hands belonging to Silas Turner's estate. See Exhibits E. H. T., Cross-Ex., Nos. 11 to 15, inclusive (Rec., pp 213-219).

To only two of these letters do we wish to call the court's attention at this time. In one of them Erle says:

"About the property. I wish you would just let it rest as it is for the present. Now about letting the others have it. I think they have all had more than I have and are getting the use of it now.

"When papa made an assignment he put all the property in Wilmer, Lunette's and Ashby's name. Did not mention me not even for the $1,300 that I had loaned him. I have his order for this am't in your hands. This is all I will ever get, as I would not make any fuss about the Vernon property, so you see I much prefer you keep the property just as it is. You are safe in what I receipt for, and I think it no more than right that I should have this as they have all the rest and are having the benefit of it now—at any rate do not take any step for the present." (Rec., pp. 213-214.)

This letter is undated, but by reference to the blowing up of the Maine contained in it, and by the postmark on the envelope, it is fixed at February, 1898.

What the assignment referred to was, has already been related (*supra*, p. 19).

In another letter, dated April 4, 1898, Erle says:

"PHILA., *April 4th.*

"DEAR MR. TRACY: Yours rec'd. I wrote you a hurried note to tell you that I w'd send the receipt 7 a. m. tomorrow per instructions. I have not been well. I am sorry you seem to doubt my word in regard to this matter. I feel that she has gotten a great deal more out of me than I have ever

owed her and I shall make the matter very plain to you when I see you. I did not mean that you should tell what was not just true. A friend of mine told me that as you had paid me more than ¼ of the balance left in your hands this should clear you, as the balance would go to the other children, so I just made the suggestion. I did not want you to act on it if it was not entirely satisfactory. You do whatever you can to save me in this matter. Anything you do will be satisfactory to me only do not let her get hold of anything. Do anything with it to avoid that. I will be glad when this is over. I do not like to worry you with this but if I get out of this it will be a good lesson to me. I shall not get into any more.

"Yours, & etc., E. H. TURNER.

"P. S.—If you write or wire me hurriedly address for 2 weeks 1820 Susquehanna Ave. I am going to change my room soon but will let you know.

"E. H. T."

Rec., p. 219.

We wish to refer now for a moment to the testimony of Thomas M. Turner merely to show how he played his part in the scheme invented and made the basis of the bill to make it appear that the complainants were kept in ignorance of all facts relating to S. H. Turner's will and his estate until after Tracy's death—and how he failed in his part.

On direct and on cross-examination he states very distinctly that he never told his wife, his children, or his relatives in Virginia that S. H. Turner had left any money at all to him or to any one else; that he *concealed* all facts pertaining to S. H. Turner's estate from *every one* except Tracy.

He did not give his brother's relatives in Virginia any information about his brother's estate (Rec., p. 115).

He did not inform his wife (Rec., pp. 119, 137, 160).

He never informed any of his children (Rec., pp. 124, 126, 160), until he wrote a letter to his daughter Wilmer in 1899, after Tracy's death.

As to these facts, his testimony is completely overborne, for it is established by the clearest evidence of disinterested witnesses, not only that Turner did *not* conceal the facts relating to Silas Turner's will, but *that he read his will aloud in the presence of Justin E. Sowers, Robert S. Rust, and one Kerfoot, and all facts pertaining to said will and estate were perfectly well known to all of Turner's relatives in Virginia and to the Turner children*, the complainants, who lived with the Rusts and Sowers in Virginia for some time on several occasions, and these facts were never kept secret from anybody.

Testimony of Robert S. Rust, Rec., pp. 302, 306.
Testimony of Justin E. Sowers, Rec., pp. 315, 319.
Testimony of Mary M. Rust, Rec., p. 327.
Testimony of Mary A. Sowers, Rec., p. 339.
Testimony of Mazie Rust, Rec., pp. 340-342.
Testimony of Ella C. Rust, Rec., pp. 346–347.

2. *Principles of law applicable to these facts.*

While, of course, the defense of laches must always rest principally upon the peculiar facts of each case, and, as often said by the courts, no case of laches can form a precedent for another, yet there are certain well-defined equitable principles which must be applied in all cases to test the right of the complainants to ask relief of a court of equity.

And first we wish to note the well-recognized distinction between laches and acquiescence.

The following use of the words by Story brings out the difference. He refers to:

"Gross *laches* in the prosecution of rights, or long and unreasonable *acquiescence* in the assertion of adverse rights."

2 Story, Eq. Jurisp. (13th ed.), sec. 1520.

Hall *vs.* Otterson, 52 N. J. Eq., 522.

De Bussche *vs.* Alt, 8 Ch. D., 286.

Again, Lord Cottenham, in Leeds *vs.* Amherst (2 Phillips, 123), says, defining *acquiescence:*

"If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection, while the right is in progress, he cannot afterwards complain."

And the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, cannot avail to keep alive that right; there must be some effective legal demand made.

Lane and Bodley Co. *vs.* Locke, 150 U. S., 193.

Mackall *vs.* Casilear, 137 U. S., 556.

In addition to this doctrine of acquiescence, which in some cases amounts to estoppel, we submit the following principles applicable to and controlling this case:

1. Mere lapse of time alone does not constitute laches; but the matter is one to be determined by the court, exercising a discretion governed by fixed principles.

2. Among those principles is the rule that where, through unexplained lapse of time (whether long or short), *the original transactions have become obscured by loss of evidence,*

death of parties or witnesses, or the loss of documents, equity will refuse relief.

Aylward *vs.* Kearney, 2 Ball and B., 403.

3. Also that the duty to act and to enforce rights arises, not only upon the ascertainment of those rights, or upon the ascertainment of a fraud, but *upon the ascertainment of facts which will put the party upon an inquiry.*

These principles have been forcibly expressed and applied in the following cases:

Speidal *vs.* Henrici, 120 U. S., 377.
Hammond *vs.* Hopkins, 143 U. S., 224.
Dade *vs.* Irwin, 2 How., 383.
Foster *vs.* Mansfield, &c., Ry., 146 U. S., 88.
Halstead *vs.* Grinnan, 152 U. S., 412, 416.
Brown *vs.* County of Buena Vista, 95 U. S., 157.
Penn. Mutual L. I. Co. *vs.* Austin, 168 U. S., 685.
Elmendorf *vs.* Taylor, 10 Wheat., 152.
Beckford *vs.* Wade, 17 Ves., 97.
See, also, Wood on Limitations (3d ed.), 486.

In *Foster vs. Mansfield, &c., Ry* (*supra*), the court, by Mr. Justice Brown, said (p. 99):

"The defence of want of knowledge on the part of one charged with laches is one so easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In that case a delay by a stockholder of ten years in filing

a bill of equity to set aside an alleged fraudulent sale of the property of the corporation was held to be such a delay as barred him from his right to relief.

In *Brown vs. County of Buena Vista* (*supra*), Mr. Justice Swayne says, quoting:

"Nothing can call forth—a court of equity—into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court."

He then says, in language peculiarly applicable to this case:

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded" (pp. 160–161).

In *Beckford vs. Wade* (*supra*) Sir W. Grant, while conceding that lapse of time constitutes no bar to the enforcement of an express trust, points out in clear language the effect of laches and acquiescence upon the enforcement of a constructive trust. He says:

"It is certainly true that no time bars a *direct trust;* but if it is meant to be asserted that a court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would

be: so far from it, that not only in circumstances where the length of time would render it extremly difficult to ascertain the true state of the fact, but, *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief*" (p. 1160).

See also *Penn Mutual Ins. Co. vs. Austin* (*supra*), where the authorities on this point are elaborately reviewed.

In the case of *Hammond vs. Hopkins, supra,* which in many respects is similar to this case, the court said (p. 250):

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged right, and the like."

It is obvious from the record, and conspicuously plain, that, in view of the fact that the case of complainants is mainly dependent on parol evidence, the loss of the testimony of Tracy himself by his death is an irreparable injury.

In *Schring vs. Schring* (43 N. J., Eq., 59) it was held that when a complainant has suffered his suit to lie without prosecution for six years, and it appears that the case is one which must be proved and resisted mainly by oral evidence, his bill should be dismissed simply on the ground that he has by his laches rendered it difficult, if not impossible, for the court to ascertain what the truth is.

In *Cranmer vs. McSwords* (24 W. V., 594, 601) the court, in explaining this rule, said:

"When the lapse of time has been less than twenty years, the decided cases show that the most important considerations in support of this defense (laches) are: *first, the death of the parties to the original transactions involved* or the intervention of the rights of third persons; second, the loss of evidence where the transactions are complicated so as to render it difficult, if not impossible, to do justice; and third, the character of the evidence by which it is sought to establish the demand—for instance, if the important facts are to be proved by parol testimony depending on the mere recollection of instances. * * * Where these elements exist, or some of them, courts have denied relief after a lapse of much less than twenty years."

In *Le Gendre vs. Byrnes* (44 N. J. Eq., 372) the court held that where delay deprives the court of the power of ascertaining with reasonable certainty what the truth is respecting the matter on which the complainant rests his right to a decree, or that he has by his delay placed himself in a

position where he has gained an unfair advantage over his adversary, his bill will be dismissed.

Upon the principles thus explained, it seems clear that Erle Turner, who came of age in 1890, and who knew directly after his uncle's death that his father had taken possession of the whole property of S. H. Turner, who knew that after 1888 his father spent large sums of money in buying and developing a farm in Texas, who knew as early as 1891 that he and his brothers and sisters were entitled to the whole estate of S. H. Turner, who, during many years and in the course of a long correspondence with Tracy never made the slightest objection to his having turned over the bulk of the S. H. Turner estate to Erle's father, and who never made any claim or demand on Tracy on account of the alleged wrongful payment of the trust funds to Thomas Turner, which was well known to Erle, it seems clear, we say, that Erle, with his knowledge of all the facts, *acquiesced* in the payments of the "trust funds" to his father, and that he is barred by his laches in prosecuting his claim against Tracy.

He ought not to be permitted to take advantage of his own negligence and delay at the cost of one whose mouth is sealed by death. Or, if he is allowed to prosecute this claim, it ought to be only after he has fairly and fully excused his laches,—after he has shown the court why it was that he made no demand on Tracy during Tracy's life, on his own behalf and on behalf of his brothers and sisters, for the funds in his hands bequeathed to the Turner children by S. H. Turner.

What explanation or excuse does Erle offer, and what excuse does the Court of Appeals find as justification for Erle's acquiescence and silence during Tracy's life?

As we have seen, the false excuse is made in the bill that Erle was "in entire ignorance of all facts relating to said trust estate from the time of Silas H. Turner's death until about September, 1898, when the complainant, Erle H. Turner, accidentally learned of the death of said Tracy" * * * "and furthermore, complainants were lulled into security by the assurances made by said Tracy to complainant Erle H. Turner, that he, Tracy, was doing the best possible for the interests of all these complainants, without once having denied the existence of the trust estate or their rights and his obligations in the premises with reference to said trust estate" (Rec., p. 6).

This excuse being, as proven by Erle Turner's own testimony, absolutely false in fact, counsel for appellees in the court below contended, that while Erle may have known all the *facts* pertaining to S. H. Turner's estate and his will, and the payment of the "trust fund" to Thomas Turner, yet that Erle never saw the text of the will, and did not know that Tracy had possession of Erle's estate in trust for them, or that Tracy had any obligations of any sort in the matter, beyond his duty to account for what remained in his hands.

If we correctly apprehend the appellees' contention, it was that although Erle knew his uncle Silas had made a will leaving his estate, not to his father, but to his father's children, he had never seen the *text* of the will and did not know that Tracy had been thereby appointed to distribute the property between them, and that although Erle knew that Tracy had in his possession money of the estate, he did not know before Tracy's death that Tracy had possession of Silas' estate *in trust* for the complainants, and that although Erle knew that his father had received money coming from his uncle's estate and belonging in part to him, he did not

know that Tracy had *wrongfully* turned the money over to his father, or that Tracy had any obligations of any sort except in relation to the moneys remaining in his hands under a *trust* which he never repudiated.

It is also asserted that the record discloses no facts brought to the attention of Erle which could reasonably have led him to suppose that Tracy had any *"legal responsibility"* for the possession of the fund by Thomas Turner or his wrongful use of it.

From these premises the argument appears to be drawn that as Erle was ignorant of the "text" and exact terms of the will and of what the estate consisted, and that Tracy was a trustee of the entire estate, until after Tracy's death, and was ignorant of Tracy's *"legal responsibility,"* he was under no obligation to take any steps against Tracy until he was informed of these material facts and until he was advised by counsel what were his, Erle's, *legal* rights, and that as that knowledge and that evidence did not come to him until after Tracy's death, and there was nothing to put him on inquiry in the matter, Erle is not chargeable with laches in respect of his conduct during Tracy's lifetime.

The Court of Appeals adopts, substantially, the argument of counsel for appellees, in explaining and excusing Erle's acquiescence and laches. It says:

"Under the circumstances it may be questioned whether the bar of laches can be claimed at all on behalf of Philip A. Tracy, who died in July, 1898, because of any express repudiation of his trust brought directly to the knowledge of these complainants within a proper time before his death.

* * * * * * *

"Applying these principles to the evidence relating to Erle H. Turner, we are of opinion also that the defense of

laches is not maintainable as to him. The testimony shows that until a short time before the suit was brought he had no definite information of the character and amount of the fund in which he had an interest, or of Tracy's misfeasance. Granting that his information was sufficient, under ordinary circumstances, to put him upon inquiry that might have led to full knowledge, we find enough in the relations between him and Tracy, and in the conduct of the latter, as shown in his letters and the payment of small sums of money, from time to time, to reasonably excuse his failure to prosecute his inquiry. Nor has the death of Tracy raised up any special equity on behalf of his estate. No prejudice has accrued therefrom through the loss of any source of material testimony" (Rec., pp. 423, 424).

We must admit that we are unable to comprehend the Court of Appeals question as to whether or not the bar of laches can be claimed on behalf of Philip A. Tracy "because of any express repudiation of his trust brought directly to the knowledge of these complainants within a proper time before his death."

It is true that Tracy never said to Erle, or to any other of the complainants: "I repudiate the trust reposed in me by the will of S. H. Turner." It is equally true, and was admitted by Erle, that Tracy did say to Erle in 1891, in substance, that S. H. Turner bequeathed his property to him (Erle) and his brothers and sisters, and that he (Tracy) had turned over to Erle's father the funds belonging to that estate which were left in his hands. While this may not have been the repudiation of a trust, it is undeniable that Tracy, then and there, informed Erle of facts sufficient to have warranted Erle in then and there demanding an accounting of Tracy as to those funds, so turned over by Tracy to Thomas Turner, if Tracy is liable at all for those

funds. But Erle Turner did not then prosecute his known rights against Tracy. He preferred to sleep upon those rights until after Tracy's death.

Replying now, more specifically and in greater detail to the argument of counsel and to the finding of the Court of Appeals, that Erle was ignorant of material facts and of Tracy's "legal responsibilities" and of his own legal rights, we submit the following:

1. The will of Silas Turner was properly probated in Fauquier county, Virginia, and there admitted to record as required by the laws of Virginia (Code 1887, secs. 25-47).

This record afforded Erle constructive notice of the entire contents of his uncle's will and the bequest thereby made to him and of Tracy's obligations thereunder.

Pomeroy expresses the well-settled rule as to the effect of a record as constructive notice as follows:

"When an instrument is one entitled to record, and has been duly executed and acknowledged or proved, and has been recorded in the proper manner and in the proper county,—then such record becomes constructive notice not only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions."

2 Pom. Eq. Jur., 2 ed., sec. 655, and cases cited.

2. Erle had actual notice and knowledge that his uncle had made a will bequeathing his estate to him and his brothers and sisters, and that Tracy had possession of a part of the estate, and that his father had received the greater part of the estate.

These undisputed facts were sufficient to impose upon Erle the duty of inquiring and ascertaining every other fact

in regard to the will of Silas Turner, and the estate thereby bequeathed, and the connection of Tracy therewith, and the history and condition of the land, so far as the rights of Erle were therein involved.

The facts above mentioned were of such a character as to have suggested to any reasonable man the necessity, for the protection of his property and rights, of obtaining full information in respect of those matters of which he had only an *imperfect* knowledge, as he claims.

Neglect to obtain further and complete information necessary for the protection of his own interests, and inattention to his own property rights, would have been so inexcusable and so unnatural as to have amounted to and constituted gross negligence.

"Inexcusable negligence of and inattention to one's own interests" have been held to be laches.

Smith *vs.* Duncan, 10 N. Y., 4.

3. Erle Turner had every motive and full opportunity to ascertain with fullness and accuracy, not only the facts which he admits he knew, but also those which it is claimed he did not know.

(*a.*) He had full opportunity to see and easy access to the will of S. H. Turner, recorded in Fauquier county, and to know its full text and exact terms.

(*b.*) He had full opportunity during ten years, in Texas, Washington, and Virginia, to ask and insist on obtaining from his father full and exact information in respect of his uncle's estate and the disposition thereof.

(*c.*) He was a depositor in the Second National Bank in this city, in which bank his father had deposited the notes re-

ceived from Tracy, two of which were deposited to Erle's credit.

(*d.*) He had every opportunity and motive to ask and insist on obtaining from Tracy a full and particular account of Tracy's dealings with Silas Turner, with the property of the estate, and with his father.

If, now, it is true, as claimed by appellees, that Erle did not know the material facts, ignorance of which on his part is now asserted and relied on, it could only have been because he failed to make any effort to inspect the will or to make inquiry of his father or of Tracy.

In short, his alleged ignorance, due to his own negligence and gross stupidity (if his own testimony be true), is sought to be used as ground for application to a court of equity to protect him from his own negligence.

4. But we insist that the pretension that Erle did not know the contents of the will and the nature and the amount of his uncle's estate and the relation of his father and Tracy thereto is not supported by the testimony in the record and is not consistent with Erle's own testimony.

No one can read Erle's testimony and note his prevarications, his admissions of misstatements on his part and his suggestions of misstatements to be made by others, his affected inability to answer plain questions and to explain or even understand expressions and statements made by him in his own letters to Tracy, and entertain a doubt that he knew a great deal more than he was willing to admit, and that he also knew what it was desirable for him to remember and what to forget in the interest of the suit in which he was testifying.

It is demonstrable from the record that he knew not only that his father had received from Tracy, in the fall of 1888, the greater part of his uncle's estate, but also just what his father had received.

He knew not only that Tracy had retained in his hands a small part of the estate, but he knew definitely what that small part was.

The record shows that from the time of his father's return to Louisiana in December, 1888, to April, 1891, when Erle went to Washington to meet his father and to have "a settlement," he being then over twenty-one years of age, he knew the particulars and details of his father's business in Louisiana and Texas, and had been in his father's service and had himself received and disbursed for his father considerable sums of money amounting to over $4,000 (R., 145 *et seq.*), paid to him by his father's checks on the Second National Bank, where the notes were placed and the proceeds of the notes as they were paid deposited to his father's credit.

At the time of the alleged settlement his father gave to him two of the very notes he had received from Tracy for $525 in payment of an alleged indebtedness due to Erle from his father.

At that very time, or shortly after, Erle was told by Tracy that his uncle had left his estate to his brother and sisters and himself (R., 63).

Some time *in the same year* Erle received from his father a copy of a certificate to serve as an order on Tracy for the payment to Erle of $2,500 (R., 84).

The certificate is as follows:

"I hereby certify that I have invested three thousand six hundred dollars ($3,600.00) in ground on Maryland

avenue between 9th & 10th streets, N. E., at thirty-five cents per square foot, and that Silas H. Turner is entitled to one-half of the proceeds derived from the sale of the same, after deducting the cost of the grading, sub-dividing and examining titles, &c.

"PHILIP A. TRACY."

R., 222.

It cannot be denied that before receiving this order there had come into Erle's possession and there had passed through his hands over $5,200 of the money of the estate.

What the fund actually was out of which these payments were made was well understood by Erle, and his father and his mother as well; and that there was no secrecy or concealment practiced concerning it by Tracy, is shown by his letter to Mrs. Turner, to which we ask attention. That letter is as follows:

"2/12/91.

"DEAR MRS. TURNER: The whole amount of money and notes turned over to Mr. Turner Nov. 30, '88, was $25,979.39. Of this amount $776.89 was in cash.

"The amount now due him in bank is $4,894.66.

"I have no way of finding out how many of the notes have been paid, but I am inclined to think very many of them have been paid.

"Yours truly, PHILIP A. TRACY."

R., 230.

It appears from the answer of Mrs. Turner to the questions sent to her by the complainants before this suit was instituted that in January or February, 1891, she had an interview with Tracy in Washington to ascertain "how the estate was being managed, how it was being turned over to my hus-

band, or whether it had been turned over to him in any amount," etc., and she was informed then by Tracy that "what he had turned over to T. M. Turner had been with my husband's being appointed guardian for the children," and "he thought he had made a mistake in doing so," or words to that effect" (R., 264).

The letter of Tracy referred to, and the interview between Tracy and Mrs. Turner, destroy the pretense that any concealment in respect of the fund of the estate, or the disposition thereof, was ever thought of before the filing of this suit.

In the receipt signed by Thomas Turner for the money and notes delivered to him by Tracy appears the item "Md. Av. lots, $1800." The amount named was one-half of the sum invested by Tracy in lots on Maryland avenue. At the time the receipt was given these lots had not been sold.

Thomas Turner testifies that in 1891 Tracy told him that he had sold the lots, and that when he, Turner, requested Tracy to turn over the proceeds to him, Tracy refused, and said that he had been advised not to turn over another dollar of the estate to Turner until Turner had qualified for the full amount of the estate (R., 166).

The proceeds of this sale Tracy invested in other notes, secured on Maryland Avenue property, as the record shows, and afterwards, in May, 1892, wrote to Turner of the $2,600 he had in his hands invested in good notes.

It was on this fund that Thomas Turner made the order in favor of Erle, and it was to this fund that the correspondence with Erle related.

The letters in the record from Erle to Tracy and from Tracy to Erle, and the receipts for money, show on their

face that they relate exclusively to the money derived from the sale of the Maryland Avenue lots, amounting to $2,600, and all the facts established by the record are consistent with that construction of them, and with no other.

For example, when interrogated in respect of the statements made by him in his letter of 1898, in respect of what he and his brothers and sisters had received of the estate, and in respect of the assignment made by his father for the benefit of his sisters and brother, he says that he does not know or remember what he meant. And it will be recalled that in April, 1898, Erle wrote to Tracy:

"A friend of mine told me that as you had paid me more than one-quarter of the balance left in your hands this should clear you, as the balance would go to the other children, so I just made the suggestion" (R., 219).

Can it be pretended, in the face of this letter, that Erle did not know what "balance" had been "left" in Tracy's hands? If Erle knew that Tracy had paid him "more than one-quarter" of that "balance," and if Erle knew that the "balance" in question "would go to the other children," must not Erle have known exactly what that balance was, whence it came, and who was entitled to it?

This letter alone is sufficient to prove conclusively that Erle had full and exact knowledge of Tracy's supposed breach of trust, of Tracy's payment to Thomas Turner of the greater part of the funds in his hands belonging to the children of Thomas Turner, of the retention by Tracy of a small "balance" of those funds, and that with such knowledge Erle fully acquiesced in Tracy's lifetime in the disposition that had been made of the S. H. Turner estate.

It was only after Tracy's death that Erle, aided by his father, conceived the scheme of compelling a second payment from Tracy's estate.

These considerations and the facts upon which they are based, in the light of the authorities we have cited, show conclusively:

1. That Erle Turner *acquiesced* in the payment by Tracy to Thomas Turner of the funds in his hand belonging to Erle H. Turner and his brothers and sisters.

2. That, after learning all material facts pertaining to that transaction as early as 1891, he slept on his rights against Tracy for more than eight years, until after Tracy's death.

A court of equity should, therefore, refuse to grant him the relief he prays against the estate of Philip A. Tracy.

V.

The complainant, Wilmer Turner, is barred from the relief prayed by her acquiescence in the alleged breach of trust, the payment by Tracy of the funds in his hands to Thomas Turner, and by her laches in prosecuting her claim.

Wilmer Turner came of age on the 11th of October, 1896.

She had been told by her mother in the summer of 1893, at Alderson, West Virginia, or in 1895 at Vernon, Texas, that Silas Turner's estate had been left to her and her brothers and sister (Rec., pp. 41-42).

In September, 1896, she had been told by her father, in Vernon, Texas, that "Tracy had not acted right and there had been some substitution of notes" (Rec., p. 42).

After she reached the age of twenty-one, with knowledge of these facts, she made no complaint to Tracy, nor any inquiry of him as to her rights.

At the time this suit against Tracy's estate was brought, her father still had a considerable portion of the estate left in his possession, and Wilmer knew this. Yet she never made any complaint or objection to him, nor any demand or request for the return of her share of the fund (Rec., p. 188).

She knew that her father had sold the farm in Texas, originally purchased with the proceeds of the S. H. Turner estate, and that he had a large part of the money arising from this sale in his possession at the very time she was testifying as a witness in this case, and that he had said he had paid or would pay this sum over to her mother; yet to this she would not make any objection or complaint.

While it is true that the neglect, delay, and laches of Wilmer in ascertaining and enforcing her rights did not date from so early a time, and did not continue so long as the neglect, delay, and laches of Erle, it is certainly true that the consequences of her inaction and of her *acquiescence* were equally injurious and disastrous to the defendants in this, that the death of Tracy has deprived his estate of his testimony in explanation of the unusual circumstances in which this suit had its origin.

Applying the equitable principles set forth above, we submit that Wilmer Turner, having in Tracy's lifetime, acquiesced in Tracy's payment to Thomas Turner of the funds in his hands, part of which belonged to her, should be barred from repudiating that payment after Tracy's death.

VI.

Tracy did not have in his possession as trustee on the 30th of November, 1888, nor at any other time, the sum of money designated in the decree appealed from as chargeable against him and against his estate, nor is his estate chargeable with interest thereon.

If the Court upon consideration shall find and hold, contrary to the foregoing contentions, that Tracy was trustee for the complainants in respect of all the property of Silas Turner that was in his possession at the time of Silas Turner's death, that the payment of money and notes to Thomas Turner by Tracy was invalid as to complainants, and that the complainants can recover in this action, from the assets of Tracy's estate, the total amount or value of the property that had belonged to Silas Turner and that came into the hands of Tracy, there will still remain to be ascertained and determined from the record, first, what was the exact amount or value of the property which came into Tracy's possession, and, secondly, whether or not the complainants are entitled to recover *interest* on the amount ascertained to be chargeable against Tracy's estate.

The decree appealed from, affirming the decree of the Supreme Court of the District of Columbia of June 8, 1904, determined that the amount or value of the property in respect of which Tracy is held to be trustee is $30,051.03.

The appellants dispute this finding and make it the subject of their 10th, 11th, 12th, and 13th assignments of error.

By the same decree interest on said sum is decreed to be chargeable. The appellants deny this liability and make it the subject of their 14th and 15th assignments of error.

These assignments of error we will consider under two propositions, the first relating to the amount with which the estate of Tracy is sought to be charged, the second relating to the charge of interest.

A. THE ESTATE OF PHILIP A. TRACY WAS NOT PRIMARILY LIABLE TO THE COMPLAINANTS IN THE SUM OF $30,051.03, BUT IF THE DECREE OF THE 10TH OF OCTOBER, 1902, WAS PROPER SAID ESTATE IS LIABLE ONLY IN THE SUM OF $27,249.04.

The duty of the auditor, as prescribed by the decree of the 10th of October, 1902, was to ascertain the amount for which Tracy's estate was chargeable. The court having held that Tracy was trustee for the complainants in respect of all the property of the estate of S. H. Turner being or coming into the hands of said Tracy at and after the death of said Silas Turner, the primary liability of Tracy was, of course, the amount of said property and estate.

The auditor found that the list of notes in the possession of Silas Turner at the time of his death, "Exhibit Erle H. Turner No. 22" (Rec., p. 211), constituted primarily the basis of Tracy's liability. These notes, including the five that had been paid and canceled before the death of Silas Turner, amounted to $28,972.10. To this sum the auditor added the amount he found Tracy to have received in 1890 from the sale of Maryland Avenue lots (in which Silas Turner had a half interest), $3,069.68, and interest in hand September 28, 1888, $439.25, and deducted cash advanced by Tracy to Thomas Turner for the funeral expenses of his brother, $630, and $1,800, one-half of the cost of the Maryland Avenue lots. The total liability thus ascertained was

found by the auditor and decreed by the court to be $30,051.03 (Rec., pp. 374-375-394-425).

The auditor's report and this finding were ratified by the court, as has been stated, and the Court of Appeals affirmed the decree of ratification (Rec., p. 425).

The appellants deny that the list of notes, Exhibit Erle H. Turner No. 22, can be considered as satisfactory proof of the primary liability of Tracy in respect of the amount in his hands at the time of the death of Silas Turner. They contend that Tracy's primary liability is to be determined by reference to the list of notes, Exhibit T. M. T. No. 2, which acknowledges the receipt from Tracy of notes and cash "in full under the will of S. H. Turner, deceased," amounting to $25,979.39. The difference between the aggregate of these two lists of notes is but $2,992.71.

The history of these two lists of notes and the purpose of each has been detailed above, and it is unnecessary again to state the circumstances in relation thereto. It is enough to say at this time that Exhibit Erle H. Turner No. 22 was found by Thomas Turner among the possessions of Silas Turner shortly after his death; that Thomas Turner brought said list to Washington and confronted Tracy with it, and that Tracy admitted that he had the notes described in the list in his possession and that they were "as good as gold."

The list of notes or receipt given by Thomas Turner to Tracy (Exhibit T. M. T. No. 2, Rec., p. 221) was the receipt given by Turner to Tracy and admittedly represents the cash and notes delivered to Turner by Tracy, except the money invested in the Maryland Avenue lots.

The point we now insist upon is that the amount of the fund with which Tracy's estate is chargeable was not the

amount of the first list of notes (Exhibit E. H. T. No. 22), but the amount of the receipt list (Exhibit T. M. T. No. 2).

In the argument for the appellees this "list" is relied on not only to prove the existence and amount of the trust fund, but it is made the corner-stone of the claim that Tracy *fraudulently* and *corruptly* turned over the greater part of the trust fund therein described to Thomas Turner in order that he, Tracy, might keep for his own benefit $6,000 of the fund, and the further claim that Tracy's "greed and fraud" constitute the explanation of his conduct in the disposition he made of Silas Turner's property, scheduled in the paper.

An inspection of the original of Exhibit 22 will, we think, convince the court that it has no evidential value or importance whatsoever and is entitled to no weight or consideration as evidence against Tracy's executors.

1. It will be seen that it is not "a paper," but *two* papers pinned together. It is not *a* list of notes, but *two* lists of notes, on separate pieces of paper which were originally parts of two sheets of foolscap. Each sheet is incomplete and mutilated. The lower part or quarter of each sheet is missing. On the lower edge of the first sheet parts of letters or figures appear which must have been continued on the parts of the page or sheets that are missing.

The pieces that compose the mutilated and imperfect pages that constitute the exhibit were *pasted together by Thomas Turner* (Rec., 107 and 52).

The last date that appears on the last sheet of the exhibit is March 12, 1888. After that Silas Turner came to Washington and made his will at the office of Tracy on the 30th of April, 1888 (R., 266).

What money, securities, or papers Silas took back with him to Virginia we have no means of knowing.

He was taken ill in the following July or August. Thomas arrived from Texas on the 11th of August, and remained with his brother until he died, on the 20th of September, 1888 (R., 106).

Thomas had access to his brother's property while he was alive, and took entire control of his effects after he was dead.

He testifies that the only evidence that he found of the ownership of *any* property was the *list*, and that except the list of notes and the will he did not find any trace of any account or of any list of any letters from Tracy—"nothing in the world bearing on the case" (R., 136).

When the document so found by Thomas Turner is produced in evidence by the complainants its appearance and condition are certainly such as to excite suspicion. The loss or removal of portions of the two sheets has apparently so changed and altered it as to destroy its completeness and to make it something different from what it originally was.

Under these circumstances the same rules or principles of evidence are to be applied to the paper, Exhibit 22, that are held to be applicable to all altered or mutilated instruments when offered in evidence.

If on the production of a written instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance.

Every alteration on the face of a written instrument detracts from its credit and renders it suspicious, and this suspicion the party claiming under it is ordinarily held bound to remove.

Greenleaf on Ev., 15th ed., vol. 1, sec. 564.

"Where the alteration appears to be suspicious on its face, and is not duly noted, *as if the paper have been cut close*

or a mutilated figure be left, or the ink differ etc., the onus *lies with the party who claims that the alteration was genuine*" (Phillips on Ev., 4th ed., vol 1, p. 606, note).

The possession of this mutilated and imperfect paper by Erle Turner and his father, the writing thereon in pencil by both, the rearrangement and pasting of its parts by the father, the use that is sought to be made of it in the interest of the complainants, well illustrate the necessity for and the advantages of the rule of evidence that has been referred to.

Erle Turner, one of the complainants, the witness who produced the paper in evidence, and Thomas Turner, into whose possession the paper first came on the death of Silas, offer no explanation of the mutilations and alterations, which are of a serious character and even suggestive of fraud.

In the absence of any explanations the paper is unworthy of judicial credit and cannot be used in its corrupted state for the advantage of the complainants. When a written instrument is shown to have been altered or defaced, it may properly be inferred that this was done in the interest of the party to be benefited by the spoliation. When that inference is not overcome by exculpatory proof, the instrument ceases to exist as a muniment or evidence of title or of right in the party who seeks to derive advantage therefrom.

2 Wharton on Evidence, 2d ed., sec. 1264.

In *Babb vs. Clemson,* 10 Sarg. & R. (Pa.), 419, Duncan, J., said:

"All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them, and so much of the business of the world depends on this kind of evidence, that it should be fortified by every legal sanction, and therefore, it is, *that all instruments,*

altered in a material part, are thereby avoided. There is a most beneficial effect resulting from this, that persons having the custody of these will not alter them, for fear of losing their security, and the reason applies as well to instruments intended as standing evidences of a contract, as instruments which are depended on as the sole security; and the true reason is, that it would be extremely dangerous to permit the party to recover by the medium of written evidence, as it originally stood, after an attempt to commit a fraud, by covering property from execution not included in the written contract. The policy of the law is that a man shall not take the chance of committing a fraud and when a fraud is detected, use the instrument as if he never had altered it; in that case, the law intervenes and avoids the falsified instrument or writing. If it avoids it, it does not do so partially, but for every legal purpose, and in reason, there can be no difference, whether it be made use of as an instrument of title, or evidence of it; both are within the same reason, and ought to be within the same law."

It appears from these authorities and many others that might be cited that it is well settled that if a paper be produced at a trial, the identity of which is made doubtful by its appearance, and which has evidently been mutilated or altered, the party producing it must satisfactorily explain its changed condition and the alterations that have been made, and that if he fails to do so the paper cannot be used in evidence in his favor for his advantage.

2. If the paper, Exhibit 22, when it was found by Thomas Turner was in the same condition that it is now except the marks and words in pencil, it certainly bore on its face no evidence or indication that it was or was intended to be a complete schedule of the property of Silas Turner in the possession of Tracy at any particular time. It was not until

1898, shortly before the bill was filed, that Erle Turner wrote thereon in pencil that the list was given by Tracy as a list of the property of S. H. Turner in Tracy's hands.

But if it was a complete and authenticated document, it would not itself constitute or be the basis of any obligation or liability.

The only value and importance that it has, all the character, power, and effect that are claimed for it by the appellees, as an account stated and admitted, are conferred by and depend upon the testimony of Thomas Turner himself, who says that shortly after the death of his brother he called on Tracy with his attorney, Mr. Hunton, and showed the paper to Tracy, who admitted that the list was correct, that he had the notes, and that they were good (R., 158).

It is wholly *improbable* that Tracy made the statement attributed to him *concerning the paper, Exhibit 22.* As we have already shown, it is exceedingly doubtful and uncertain what list or paper Thomas Turner then had in his possession and what he showed Tracy.

Was it the first sheet or the second sheet of Exhibit 22, or both sheets pinned together?

Were the parts now absent then in their proper places?

We know as a matter of fact that *all* the notes described in what appears in the record as Exhibit 22 were not in the possession of Tracy, as Tracy well knew.

The notes of Caroline Isdel, amounting to $1,325.50, and the notes of Mary Lewis, amounting to $1,200, had been paid and canceled and the deeds of trust given to secure them had been released (R., 358).

Furthermore, if Tracy *did* make the admissions and statements testified to by Thomas Turner, and made them in the

presence of Mr. Hunton, a highly respectable lawyer of Virginia, it seems improbable that the complainants would have abstained from calling or tendering him as a witness.

Independently of the inherent improbabilities of the truth of Thomas Turner's statement as to Tracy's *admissions* when Exhibit 22 was shown to him, Thomas Turner, the only witness produced to prove that such a statement was made, is unworthy of credit.

(*a.*) His credibility is impeached by his confessions of the concealments from and misrepresentations to his wife and children in respect of his children's property, and by the use which he seeks to have made of his alleged concealments and misrepresentations in order to obtain from the defendants the value of the property which he himself received from Tracy, and a portion of which he still holds.

(*b.*) He is impeached by his co-operation in the plan obviously formed by Erle after Tracy's death to avoid the consequences of his own conduct, and to excuse and justify his long neglect and failure to hold Tracy to accountability for his alleged misconduct of which he knew.

(*c.*) He is impeached by his deliberate and false statement that he did not give any information about the will of his brother to any of his brother's relatives in Virginia before returning to Louisiana, when the fact, fully established by the testimony, is that the day after the burial of Silas he, Thomas, himself read the will aloud in the presence of three witnesses, two of whom testified to that occurrence and one of whom is dead (R., 302–315).

This pretended concealment of the contents of the will

was an important element in the plan of attack on Tracy's estate.

(*d.*) He is impeached by his conveyance of the Texas farm and personal property to his children, Wilmer, Ashby, and Lunette, for the purpose of keeping it from his creditors, by a deed reciting, as consideration, moneys paid by Tracy, "executor of the last will and testament of my deceased brother, S. H. Turner in trust for the use and benefit of my children, viz: Wilmer Turner, Ashby Turner and Lunette Turner" (R., 239 and 241), and by his procuring and permitting the property to be sold for taxes, and by buying it in from the State in his own name and for his own benefit after its forfeiture to the State.

(*e.*) He is impeached by his insensibility to moral obligations as shown in the instances above mentioned and by his claim that the proceeds of the sale of the Vernon property, which was originally purchased with the money of the estate of Silas Turner, belongs to him in his own right and not to his children (R., 143).

The false testimony given by Thomas Turner in respect of his concealment of the will of his brother is of itself sufficient to warrant the court in rejecting his testimony *in toto*.

In the case of the Santissima Trinidad, 7 Wheat., 283, Story, J., said:

"But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the

charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

In the case of *Huber vs. Teuber*, 3 MacArthur, 484, Mr. Justice Wylie said:

"But in respect to the credit of a witness before a jury, this materiality is not essential. A witness who is discovered on a trial to have sworn to a deliberate falsehood in relation to a matter the truth of which he must have known at the time of giving his testimony, although the fact may not be material, yet by that act exhibits such gross insensibility to the obligations of his oath, and to truth, and such shameless hardihood in vice, as leaves no ground for judicial belief as to any part of his testimony."

It is therefore submitted that, in view of the foregoing considerations, the list of notes, Exhibit E. H. T. No. 22, cannot be taken or used as the primary basis of liability of Tracy's estate to the appellees.

If it should be held that Tracy's estate is liable for the fund in Tracy's possession at the time of Silas Turner's death, and that the payment to Thomas Turner was not a good payment, the primary basis of the liability of the estate of Tracy would be the notes and money described in the *receipt* of Thomas Turner given to Tracy, Exhibit T. M. T. No. 2 (Rec., 221), amounting to $25,979.39, and *not* the so-called "list of notes," Erle H. Turner Exhibit No. 22 (Rec., 211), amounting to $28,972.10.

To the amount of this primary liability there should be added the sum of $1,269.68, the amount found by the auditor to have been received by Tracy as profits from the sale of the Maryland Avenue lots, making the primary liability of Tracy $27,249.04.

B. THE APPELLEES ARE NOT ENTITLED TO RECOVER INTEREST. THE GRANTING OR WITHHOLDING INTEREST IN CASES LIKE THIS RESTS IN THE DISCRETION OF THE COURT. THE ALLOWANCE OF INTEREST WOULD BE INEQUITABLE IN VIEW OF THE FACTS DISCLOSED BY THE RECORD.

The total amount decreed to be paid to the appellees out of the assets of the estate of Tracy is $48,641.44, with interest on $30,051 at six per cent. from February 1, 1904, until paid. Of the sum named more than one-half is for interest accrued from November 30, 1888, to the date of the accounting, February 1, 1904, amounting to $27,133.44. This will be increased by the interest to accrue on $30,051 from February 1, 1904, until paid (Rec., p. 394).

In the auditor's report which was confirmed by the court below, and in the opinion of the Court of Appeals, the appellants' objections to the allowance of interest received scanty notice and are summarily disposed of.

The auditor bases his conclusion on the opinion or finding of the court that Tracy had abandoned his trust and upon his own finding that there was no reasonable excuse for his action (Rec., p. 371). The Court of Appeals adopted the finding of the auditor (Rec., p. 424).

It may be true that a trustee, charged with duty of paying over certain funds to a *cestui qui trust*, is liable for interest on the amount of those funds (in some cases compound in-

terest) if he dissipates them or misappropriates them or retains them in his possession, mingling them with his own.

In such cases the faithless trustee will be decreed to pay interest or compound interest in order to restore to the beneficiaries of the trust that which they had lost by the trustee's negligence or willful misappropriation, and to punish the trustee for his wrong-doing. This strict rule of trustee's accountability, it is to be observed, has two fundamental reasons: first, it aims to give back the *cestuis qui trustent* what they had been deprived of, and, second, it aims to punish a trustee for a breach of his duty, and to take away from him the benefits he has received out of property which was not his own.

The rule was applied in this case by the court below because Tracy "violated his trust by paying the bulk of the fund to Thomas M. Turner, and retaining the remainder, about $6,000, and using it for his own benefit" (Rec., p. 424).

Conceding, for the purposes of this argument, that Tracy "violated his trust" when he paid the bulk of the fund to Thomas M. Turner, we contend that the strict rule of accountability for interest should not be applied to his estate, because, first, the beneficiaries of the trust, the appellees herein, have already received substantial benefits from the trust funds; secondly, because Tracy did not retain the trust funds or any part thereof in his possession, and never used it or any part thereof for his own benefit, and was not guilty of any fraud; and, thirdly, because the complainants, by their delay and laches in asserting their claim against Tracy during his life, have lost whatever rights they might otherwise have had to demand interest against his estate.

THE DISCRETION OF THE COURT IN ALLOWING OR DISALLOWING INTEREST.

We suppose it will not be denied that, as a general rule, interest is not demandable as of right, except when provided by contract, and that it is granted or denied by the courts of the United States in the exercise of their judgment and discretion, and in view of all the facts and circumstances they are called upon to consider. The court's discretion in allowing or disallowing interest, according to the circumstances of the case, is to be exercised as well in a case in which a trustee is sought to be held accountable for interest as in any other case. For example, in *Glover vs. Patten* (*infra*), this court said that Mrs. Patten's estate (Mrs. Patten having been a trustee for her daughters in her lifetime) should not be held accountable for interest on certain funds which, as trustee, she had not turned over to her daughters, because it appeared to be inequitable to so charge her with interest, she having maintained and educated her daughters out of her own funds.

This court has repeatedly declared and held that interest, where it is given as damages, rests in the discretion of the court, to be exercised in the light of all the circumstances in the case.

Redfield *vs.* Iron Co., 110 U. S., 374.
U. S. *vs.* Sanborn, 135 U. S., 281.
U. S. *vs.* North Carolina, 136 U. S., 216.
Spalding *vs.* Mason, 161 U. S., 375.
Glover *vs.* Patten, 165 U. S., 412.

In numerous cases decrees have been ordered to be entered without interest, and no reason given for the action of the court.

In the case of *Redfield vs. Ystalyfera Iron Co.* (110 U. S., 174, 176), the court said:

"Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but *when it is given as damages, it is often matter of discretion.*"

What, then, are the circumstances and considerations that should guide the court in the exercise of its judicial discretion in this matter of interest?

1. *Complainants have had substantial use of funds.*

It is an indubitable fact that the appellees derived substantial benefit and advantage from the $25,000 paid over by Tracy to the father of the appellees.

The auditor finds that "after the death of Silas Turner Thomas Turner had no means or income for the support of his family," which was composed of his wife and the complainants, "except that derived from the estate of Silas Turner, which was the property of his children."

He invested, of the money received by him, $7,550 in the purchase of a home in Vernon, Texas, and in the purchase of a farm near Vernon and in stock and machinery, etc.

"These investments," the auditor says, "furnished support for the family from the time they were made and the only other source from which support was derived was funds of the same estate which Thomas Turner had drawn from the Washington bank, and such personal service as he rendered in operating the farm" (Rec., pp. 373–374).

What his children ate and what they wore, the roof that covered them, all the necessaries and comforts they had, were bought with the securities obtained from Tracy, except perhaps some small earnings by Erle and Wilmer.

Thomas did, however, use, of the fund, in obedience to the positive direction of his brother given to him just before his death, $1,500 in the purchase of a home for Mrs. Rust, the niece of Silas Turner, at whose house he died, and also $500 in paying the notes of another niece (R., 142).

The benefit actually received by the complainants from the estate in the hands of Thomas Turner, estimated and expressed in dollars and cents, was approximately, we allege, equal to the interest they would have received from their respective shares or interests if these shares had been separately invested so as to produce 6 per cent. interest per annum.

If it be admitted that the fund in Tracy's hands was $30,051.03, as claimed by the appellees, the share of each child would have been $7,512.75, and the interest thereon at 6 per cent. per annum would be $450.75, less than $1.25 per day.

We ask consideration of these figures, only as showing in a general way what the appellees' respective shares would have produced, what would have been the utmost sum available for their support and benefit, and to show that the value of the benefits they received was measurably equal to the interest on the fund they would have received if their shares had been invested.

Is it unreasonable to say, in view of the facts disclosed by the record, that the complainants have actually received already the full benefit of a fair rate of interest on the prop-

erty their uncle left them, and are they now to be paid interest on that fund as though they had received nothing?

It is not to be forgotten in this connection that Thomas Turner testifies that Silas said to him after he had made his will and shortly before his death that *he had left his estate to his, Thomas', children and wanted him, Thomas, to manage it* (**Rec., 143**).

2. *Tracy was guilty of no fraud and derived no personal use or advantage from S. H. Turner's estate.*

We have shown above (*supra*, p. 54 *et seq.*) that the payment by Tracy to Turner of the great bulk of the funds in his hands was made in entire good faith on the part of Tracy, believing that it was actually for the best interests of the Turner children that the funds should be gotten away from Washington as soon as possible to prevent a threatened contest of the will by S. H. Turner's relatives in Virginia, of which danger Turner informed Tracy, and that they should be turned over to Thomas Turner to avoid the expense and delay of administration in Virginia, and, finally, what probably really induced Tracy to deliver the funds to Turner, that Turner represented to Tracy that as *natural tutor and agent for his minor children* he was duly authorized to receive the funds and to give a good acquittance therefor.

We say these facts show conclusively that the plan of getting the funds belonging to the Turner children into the hands of Thomas Turner did not originate with Tracy, and the circumstances surrounding the tradition of the funds to Turner clearly liberate Tracy of any imputation of fraud or dishonesty, and disprove any intention on his part of keeping from the Turner children one cent of the funds which belonged to them.

It is emphatically asserted by counsel for appellees, however, and indeed by the Court of Appeals (Rec., p. 424), that Tracy retained about $6,000 of the trust funds and used it for his own benefit.

We have already attempted, with some care and detail, to show that the only basis for this assertion is that, according to the Exhibit E. H. T. No. 22, Tracy is chargeable with $6,000 more than he would be if the Exhibit T. M. T. No. 2 were adopted as proof of the amount of money in Tracy's hands, and that the Exhibit E. H. T. No. 22 is in itself a suspicious-looking and uncertain bit of evidence, and that it depends for its credibility and reliability upon the testimony of Thomas Turner, who found it among Silas Turner's possessions, as he says, and who brought it to Washington and exhibited it to Tracy. Thomas Turner, as we have also shown, was a witness deeply interested in the result of this suit, who did not hesitate to misrepresent facts and deliberately to fabricate facts which he thought might aid his children in their attempt to succeed in their suit. An illustration of this was his testimony to the effect that he *concealed* the contents of Silas Turner's will from his relatives in Virginia (a material fact, as explaining his children's ignorance of the will, and, therefore, excusing their laches). That this testimony was false is conclusively established by the testimony of those relatives in whose presence the will was read by Thomas Turner (*supra*, p. 82).

We have shown, also, that for many other reasons Turner's testimony is not entitled to credit and should be rejected where it makes in favor of the appellees (*supra*, pp. 109-110).

We are fully justified, therefore, in view of the mutilated and altered appearance of the Exhibit E. H. T. No. 22, and

in view of Thomas Turner's readiness to distort the truth when it suited his purpose, to ask this Court to reject that paper, vouched for solely by Thomas Turner, as establishing a charge against Tracy's estate; and if that paper be rejected, no scintilla of evidence remains to prove that Tracy retained and kept for his own use the sum of $6,000 out of the funds belonging to appellees.

Since, then, Tracy was acting in good faith and, as he thought, for the best interests of the appellees when he paid over to Thomas Turner, their father, *all* the funds in his possession (except the Maryland Avenue lots), and since he derived no personal profit out of that transaction, it cannot be said that he was guilty of an actual fraud, and he is not, *on that ground*, chargeable with interest on the moneys so paid over.

It has been held in England that even an express trustee is not chargeable with interest on money paid to a wrong person under a mistake of fact, the trustee not having received the benefit or use of the money so paid over.

1 Lewin on Trustees (1st Am. ed.), 349 (star paging).
Saltmarsh *vs.* Barrett (No. 2), 31 Beav., 349.

3. *Interest should not be allowed because of complainants' acquiescence and laches.*

We have earnestly contended that the complainants, Erle and Wilmer Turner, with full knowledge of the facts relating to their uncle's will, with full knowledge of the fact of Tracy's original possession of funds belonging to the estate of S. H. Turner, and Tracy's tradition of those funds to Thomas M. Turner, except a small part retained by Tracy, and with full knowledge of the use and disposition made of those funds by

their father, actually, and so far as Erle at least was concerned, expressly, assented to and acquiesced in all of Tracy's acts in relation to their property; and we have argued that because of this acquiescence on their part, and because of their delay in asserting their pretended rights against Tracy during Tracy's lifetime, they should be denied relief as against Tracy's estate (*supra*, p. 76 *et seq.*).

Their acquiescence and laches are important elements, also, in determining whether or not interest should be charged against Tracy's estate, if the Court should be of opinion that, in spite of their acquiescence and laches, they are entitled to recover.

It has frequently been held that delay in prosecuting a demand is a significant consideration, to be duly weighed by a court when it becomes that court's duty to determine whether or not a person liable to an accounting should be chargeable with interest. Plainly, it is consistent with equity and fair dealing that where one has a claim against a trustee for an accounting of funds that have come into the latter's hands, he should not be allowed to charge interest against the trustee, if he has apparently acquiesced in the trustee's disposition of the funds, which may have been wrongful; for a prompt complaint to the trustee would have led to an immediate accounting and therefore a saving of the interest sought to be charged, which has accrued during the period of acquiescence and delay.

Thus, in the present case, if Erle had made an effective complaint to Tracy in April, 1891, when, as he admits, he knew all of the facts relating to the S. H. Turner estate, his interest therein, and Tracy's relations thereto, and if he had then demanded of Tracy his share of the S. H. Turner estate,

Tracy would have been compelled to pay the same, with interest only from 1889 to 1891. Erle, however, did not see fit to make such demand. He expressed himself, in substance, as satisfied with the disposition that Tracy had made of his share of the funds that had been in Tracy's hands; or, if he was not content therewith, he preferred to say nothing to Tracy concerning his dissatisfaction during Tracy's life. It was only after Tracy's death that he asserted his claims to the "trust fund," which he swore in his bill of complaint came into the possession of Tracy at Silas Turner's death, and after his death came into the possession of the defendants, his executors, although he then well knew that this statement was contrary to the facts.

Upon these facts is it just and equitable that Erle should receive the interest that has accrued on his share of the fund during the period of time which he allowed to elapse, with knowledge of his supposed rights against Tracy?

This Court, in exercising its discretion in this matter, should be guided by the principles it laid down in the case of *U. S. vs. Sanborn* (*supra*). In that case Sanborn had been paid public money through a misunderstanding on the part of the Secretary of the Treasury, caused by a "misrepresentation" made to him by Sanborn. In a suit brought by the United States to recover the money so paid, this Court said:

"We are of opinion that the payment of the $7334 to the defendant was due to a misapprehension, upon the part of the Secretary of the Treasury, as to the nature of his services—a misapprehension resulting from his representations to that officer—and that the amount so paid ought, in equity and good conscience, to be returned to the United States.

"But we are of opinion that the court below erred in allowing interest for any time prior to the institution of this action. * * * We think that the same rule (disallowing interest) should be applied against the Government when, in a case like the present one, it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him."

The same rule has been specifically applied in favor of a trustee against whom a suit for an accounting was brought after a long and unexcused delay, not, however, amounting to such laches as would bar the complainants from all relief.

In *Brinkly vs. Willis* (22 Ark., 1) the defendant was held accountable for certain property which had come into his possession as executor and trustee, a part of which he wrongfully delivered to a person not entitled to receive it. He was held to be accountable for the value of this property (a slave), *but not for interest,* because of the unreasonable delay on the part of the complainants in asserting their claim.

See also *Lindsey vs. Lindsey,* 1 Dessau. 150.

In his work on the "Law of Interest," Perley sets forth the rule expressed in the above cases as follows:

"Where a party has neglected to claim interest until after the settlement of a running account, or an award of a committee has been made, he will not be allowed such claim. So he will not be allowed interest if he has been guilty of gross laches in delaying the prosecution of his claim.

* * * * * * *

"So, if a trustee violates his trust, and the offended party

delays for many years to bring his suit for recovery, interest will only be allowed from the commencement of the suit."
Perley's Law of Interest, p. 140.

We contend that in this case it was directly Erle's fault that he did not secure the payment of his share of the funds in question in 1891, and directly Wilmer's fault that she did not secure the payment of her share of the funds in "1893 or 1895" (if they were entitled at all), and for that reason they should not now be allowed to recover the interest on their respective shares, which has accrued through their own fault, negligence and laches.

We, therefore, contend that the appellees are not entitled to charge Tracy's estate with interest, because, upon all the circumstances of this case, which the Court must in the exercise of its discretion consider, it appears, (1) that the appellees have already had the substantial use of the funds in question; (2) that Tracy was not guilty of any fraud in his disposition of those funds, and that he retained no part of those funds in his own possession, and had no personal use or benefit of them; (3) that the complainants acquiesced in the disposition of the funds in question made by Tracy, and refrained from asserting their supposed rights to said funds for a period of almost ten years, during which period the interest now claimed accrued.

VII.

It is respectfully submitted:

1. That the decree of the court below should be *reversed*, with costs, with directions to dismiss the bill of complaint.

2. Or, that the decree of the court below should be *re-*

versed, with costs, with directions to dismiss the bill of complaint as to the complainants, appellees herein, Erle Turner and Wilmer Turner, because of their acquiescence and laches.

3. Or, that the decree of the court below should be *reversed*, with costs, with directions to refer this cause to the auditor to state the accounts of the parties hereto, and on such accounting to charge the estate of Philip A. Tracy only with the sum of $1,800, together with the profit realized therefrom, retained by him out of the funds and moneys in his hands belonging to the complainants, appellees herein.

4. Or, that the decree of the court below be *reversed*, with costs, with directions to refer this cause to the auditor to state the accounts of the parties hereto, and on such accounting to charge the estate of Philip A. Tracy only with the sum of $27,249.04, without interest.

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